CLERK'S COPY.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 303

[redacted]

vs.

DUKE DUKE CRENSHAW, INDIVIDUALLY AND AS TRUSTEES OF THE DUKE ENDOWMENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[redacted]

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 5780

Doris Duke Crosswell, individually and as Trustee of the Duke Endowment,
Plaintiff-Appellee,

vs.

Township of Hillsborough, Somerset County, N. J., and Christopher G. Hogan, Collector of Taxes of the Township of Hillsborough,
Defendants-Appellants.

On Appeal From Judgment of the United States District Court for the District of New Jersey

APPENDIX TO BRIEF FOR APPELLANTS

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United States District Court

DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment,

Plaintiff,

vs.

TOWNSHIP OF HILLSBOROUGH, Somerset County, N. J., CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough, WILLIAM LIFGREN, W. W. DAVENPORT, JR., and ANGELO R. SORIANO, Somerset County Board of Taxation, and CHARLES V. N. DAVIS, Assessor of the Township of Hillsborough,

Defendants.

CIVIL ACTION
No. 1665

Docket Entries

1941		
July	14	Complaint filed.
	14	Summons issued.
	21	Summons returned served on July 14th, filed.
	31	Consent order extending time to file answer, filed.
Aug.	27	Notice of motion for order dismissing complaint as to William Lifgren, W. W. Davenport, Jr., and Angelo R. Soriano, filed.
Sept.	8	Hearing on motion for order dismissing case as to William Lifgren, W. W. Davenport, Jr., and Angelo R. Soriano. No opposition. Order signed (Fake).

Docket Entries

Sept.	8	Order dismissing complaint as to William Lifgren, W. W. Davenport, Jr., and Angelo R. Soriano, filed.
	13	Answer of Township of Hillsborough, Christopher G. Horner, Collector of Taxes, Charles V. N. Davis, Assessor of Township, filed.
	16	Notice fixing place for trial filed (Newark).
Oct.	28	Notice of taking depositions, filed.
	29	Notice of motion for order staying taking of depositions and for dismissal of complaint as to Twp. of Hillsborough, G. G. Horner, Chas. V. N. Davis, filed.
	29	Notice of motion for order declaring certain tax assessments levied invalid, filed (2).
Nov.	3	Hearing on motion for order staying taking of depositions, and for dismissal of complaint as to Township of Hillsborough, G. G. Horner, Charles V. N. Davis, Hearing on motion for order declaring certain tax assessment levied invalid. Decision Reserved. Depositions may be taken in meantime (Fk).
	5	Order denying motion for stay and to limit depositions, filed.
	21	Notice of taking depositions, filed.
	24	Petition for issuances of duces tecum, filed.
	24	Order for issuance of subpoena duces tecum, filed.
	25	Notice of motion for order staying of taking of depositions, filed.

Docket Entries

Dec. 1 Hearing on motion for order staying taking of depositions. Denied (Fake).

2 Order denying motion for stay of taking depositions and of the production of documents, etc., filed.

1942

Jan. 3 Notice of taking depositions, filed.

6 Notice to take depositions, filed.

8 Notice of motion for order limiting scope of examination, and for order forbidding inquiry into certain evidence, etc., filed.

12 Hearing on motion for order limiting scope of examination, and for order forbidding inquiry into certain evidence. Court ordered that when questions are asked of plaintiff which are objectionable. Court reserved right to decide at a later time whether the question should be allowed (Fake).

15 Order touching examination of plaintiff, filed.

Feb. 9 Depositions of William Irving Frost, et al., filed.

9 Depositions of Harry McMurtry, and Chas. V. N. Davis, filed.

9 Depositions of Walter C. Linbarger, et als., filed.

9 Depositions of Christopher G. Horner, filed.

9 Depositions of Christopher G. Horner and William Lifgren, filed.

9 Depositions of William Lifgren and Edward Lindstrom, filed.

9 Depositions of Edward Lindstrom, J. Irving Stryker and Everest L. Belli, filed.

Docket Entries

Feb.	9	Depositions of Angelo R. Soriano and Wm. W. Davenport, Jr., filed.
	9	Depositions of J. Glenn Anderson, James E. Mullaney, and Alfred L. Kirby, filed.
Mar.	6	Deposition of Doris Duke Cromwell, filed.
July	30	Memorandum, filed (Fake).
Aug.	10	Order denying motion to dismiss complaint, filed.
Oct.	22	Notice of motion for leave to filed amended and supplemental complaint and for order adding additional parties defendant, filed.
	22	Proposed amended and supplemental complaint, filed.
Nov.	2	Hearing on motion for leave to file amended and supplemental complaint, and for order adding additonal defendants. Decision Reserved. Briefs to be filed in 10 days (Fake).
1943		
Apr.	28	Opinion, filed (Fake). Amendments to be allowed upon condition all parties submit to trial by jury.
May	6	Notice of motion for re-argument, filed.
	6	Affidavit of service, filed.
	10	Hearing on motion for re-argument. Decision reserved. Briefs to be submitted (Fake).
Nov.	8	Call of calendar—Case marked "ready pending motion" (Fake).
1944		
Jan.	7	Opinion, filed (Fake).
Mar.	15	Notice of Motion for Summary Judgment, filed.

Docket Entries

Feb.	15	Affidavit of Service of Motion and Affidavit, filed.
	22	Notice of Motion of Defendant, Charles C. N. Davis, Assessor of the Township of Hillsborough, for Summary Judgment, filed.
	22	Notice of motion of defendants for dismissal, filed.
	27	Hearing on motions—Briefs to be submitted in 4 weeks by both sides—Decision Reserved (Fake).
Apr.	4	Call of Calendar—Case marked "ready subject to motion."
July	5	Call of calendar—Ready (May take Judgment) (Timmerman).
	14	Opinion filed (Fk) (Judgment in favor of Chas. V. N. Davis and D. D. Cromwell, to be entered).
	19	Notice of Motion to Settle Terms of Judgment and acknowledgment of Service, filed.
	19	Affidavit of Service of Notice of Motion, filed.
	24	Hearing on motion to settle terms of Judgment—Off to 8/7/44 (Fk).
Aug.	7	Hearing on motion to settle terms of Judgment—Motion Granted. Judgment signed (Fk).
	7	Judgment dismissing complaint against defendant Charles V. N. Davis, with costs to be taxed against plaintiff Doris Duke Cromwell, and Judgment in favor of plaintiff, Doris Duke Cromwell, and against defendants, Hillsborough Township, Somerset County, N. J., and Christopher G. Horner, Collector, with costs, filed.

Docket Entries

Aug.	7	Judgment in favor of Charles V. N. Davis, defendant against Doris Duke Cromwell, plaintiff, with costs, entered.
	7	Judgment in favor of the plaintiff Doris Duke Cromwell, and against defendants, Hillsborough Township, Somerset County, N. J. and Christopher G. Horner, Collector, with costs, entered.
Nov.	4	Notice of Appeal, filed (K. & K.) Notice sent Pitney, Hardin & Ward, Esqs., attys. for appellee, and to Wm. P. Rowland, Clerk, U. S. Circuit Court of Appeals.
	4	Bond on Appeal, filed.
	13	Statement of points on appeal to U. S. C. C. A. with acknowledgment of Service, filed.
	13	Designation of Contents of Record on Appeal to U. S. C. C. A. with acknowledgment of service, filed.
	21	Designation by plaintiff of additional portions of Record on Appeal and acknowledgment of Service, filed.
Dec.	13	Transcript of Record on Appeal forwarded to Clerk, U. S. C. C. A.

Complaint

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment, *Plaintiff*, *vs.* TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey; CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough; WILLIAM LIFGREN, W. W. DAVENPORT, JR., and ANGELO R. SORIANO, Somerset County Board of Taxation; and CHARLES V. N. DAVIS, Assessor of the Township of Hillsborough, *Defendants.*	CIVIL ACTION No. 1665 COMPLAINT

The complaint of Doris Duke Cromwell individually and as such trustee respectfully shows that:

1. Plaintiff is a natural-born citizen of the United States, residing in and an inhabitant of the Territory of Hawaii and is a citizen of said Territory.

2. Defendant, Township of Hillsborough is a municipal corporation of the State of New Jersey, located in Somerset County, in said State of New Jersey, and is one of the taxing districts of said County and is a citizen of New Jersey within the meaning of the Judicial Code.

3. Defendant, Christopher G. Horner is a citizen and resident of the State of New Jersey, residing in said Township of Hillsborough, and is and was at all times hereinafter mentioned Collector of Taxes for said Township of Hillsborough, appointed and acting pursuant to the statutes of the State of New Jersey in such case made and provided.

4. Defendants, William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, are all citizens and residents of the State of New Jersey and are now and as hereinafter mentioned were the members constituting the County Board of Taxation for the County of Somerset in New Jersey, appointed and acting under and pursuant to the statutes of said State in such case made and provided.

5. Defendant, Charles V. N. Davis, is a citizen and resident of the State of New Jersey and is and at all times hereinafter mentioned was the Assessor of the Township of Hillsborough in said Somerset County, duly appointed and acting under and pursuant to the statutes of said State in such case made and provided.

6. This is a suit of a civil nature under and by virtue of the Federal Declaratory Judgment Act of June 14, 1934 as amended August 30, 1935 (U. S. C. A., Title 28, Sec. 400) to have declared the rights and other legal relations of the interested parties. It arises under the Constitution of the United States and is also between a citizen of the Territory of Hawaii, plaintiff, and citizens of the State of New Jersey, defendants. It involves an actual controversy which must be determined between said plaintiff and said defendants, and the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars

($3,000). Of said suit and controversy the District Court of the United States for the District of New Jersey has original jurisdiction for the purposes aforesaid under and by virtue of the said Federal Declaratory Judgment Act.

7. By Sec. 54:4-35 of the Revised Statutes of New Jersey it is provided that said Assessor

> "shall begin the work of making assessments upon real and personal property on October 1st in each year and shall complete the work by January 10th following, on which date he shall attend before the County Board of Taxation and file with the Board his complete assessment list, and a true copy thereof to be called the Assessor's Duplicate, properly made up and legibly written in ink, to be examined, revised and corrected by the Board as hereinafter provided."

8. Sec. 54:4-47 of the Revised Statutes of New Jersey provides:

> "The county board may adjourn from time to time in the discharge of its duties, and may, after investigation, revise, correct and equalize the assessed value of all property in the respective taxing districts, increase or decrease the assessed value of any property not truly valued, add to the lists and duplicates any property which has been omitted or overlooked, at its true value, and in general do everything necessary for the taxation of all property in the county equally and at its true value."

9. Sec. 54:4-55 of the Revised Statutes of New Jersey provides:

"The county board of taxation shall, on or before April first in each year, cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes assessed, to be delivered to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record."

10. An assessment against plaintiff on account of personal property for the taxing year 1940 was made by defendant Davis as said Assessor, and the 1940 Assessment List and the duplicate thereof which included said assessment were corrected, revised and completed by the said Somerset County Board of Taxation and filed and delivered under and pursuant to the aforesaid statutes and at the times therein required, and as thus made and as thus corrected, revised and completed said assessment was for and upon a valuation of $150,000, the taxes in respect of said assessment were in the total amount of $4,680 and were duly and fully paid by plaintiff; and until the matters and things hereinafter alleged, there has never been, by notice, application, complaint, hearing, revision, correction or otherwise, any question of said assessment or any attempt to increase the same in the manner prescribed by the statute in such case made and provided, or any attempt to add omitted personal property for the taxing year 1940 by said Assessor, or by said Collector, or by the said Somerset County Board of Taxation, or by any resident or taxpayer of said Township of Hillsborough.

11. On or about November 7, 1940, while plaintiff was at her home and domicile in said Territory of Hawaii, defendant Davis, as Assessor of said Township of Hillsborough, wrote to said plaintiff a letter, directed to her at

Duke Farms, Hillsborough Township, Somerset County, New Jersey, reading as follows:

"HILLSBOROUGH TOWNSHIP
NESHANIC, NEW JERSEY

November 7, 1940

Mrs. Doris Duke Cromwell
Duke Farm
Hillsborough Township
Somerset County, New Jersey

Dear Madam:

You are hereby directed to render to me, as Assessor of Hillsborough Township, Somerset County, New Jersey, a true account of your personal property, money, effects and credits, as of the first day of October, 1940, so that I may determine and fix a proper assessment of all your personal property taxable in Hillsborough Township.

If you desire to make claim for deduction of debts or allowance of any personal property, or securities, claimed to be exempt from taxation, please take notice that such claim must be made in strict conformity with the terms and provisions of Revised Statute 54:4-15. The last day for filing such claims for exemption is January tenth (10th) of each year.

Very truly yours

s/ CHAS. V. N. DAVIS
CHAS. V. N. DAVIS
Assessor of Hillsborough Township"

12. On or about December 4, 1940, one Freeman J. Daniels, acting as attorney for plaintiff and at her direction, replied to said letter as follows:

"December 4, 1940

Mr: Charles V. N. Davis,
Assessor of Hillsboro Township,
Neshanic, New Jersey.

Dear Sir:—

In the absence of Mrs. Doris Duke Cromwell at her home in Honolulu I have for attention your letter to her of November 7th asking her to render a true account of her personal property, money, effects and credits as of the 1st day of October 1940 and saying that claims for deduction and exemption must be filed in strict accordance with Revised Statute 54:4-15 before January 10th of each year, as that is the last day for filing.

I understand that you have inspected the tangible personal property at Duke Farms near Somerville, and you are therefore familiar with all the tangible personal property located in your jurisdiction which Mrs. Cromwell owned on October 1st 1940. Mrs. Cromwell is not further taxable in your district on or with respect to any personal property she may have owned on October 1st 1940. On that date she was not a resident of the State of New Jersey. Theretofore she had removed to her home in Honolulu in the Hawaiian Islands, where she has since continued to make her residence.

Yours very truly,

FREEMAN J. DANIELS"

13. Plaintiff alleges that prior to October 1, 1940 plaintiffe deliberately and intentionally ceased to be a resident and inhabitant of said Township of Hillsborough and of said State of New Jersey, and established her residence and domicile in said Territory of Hawaii, and thereupon and thereby became and has since remained and still is a resident, inhabitant and citizen of said Territory of Hawaii, maintaining there her home and domicile. Thereby said domicile in said Territory of Hawaii became and has since remained the situs of any and all intangible personal property owned or held by said plaintiff either individually or as trustee, except as any such intangible personal property may have acquired and had a situs distinct from the domicile of plaintiff. The tangible personal property of said plaintiff which was located in said Township of Hillsborough, and only such personal property, was thereafter liable to taxation in said Township.

14. Said letter from said Assessor to said plaintiff was intended to constitute and did constitute an application of the Assessor for and with respect to the taxing year 1941 under and pursuant to Sec. 54:4-12 of the Revised Statutes of the State of New Jersey, whereby it is provided that:

> "Every inhabitant of the taxing district and every owner of personal property located in the district shall on application of the assessor, forthwith render a true account of his name and personal property, money, effects and credits, and the Assessor shall set down in a list in proper columns the name, the value of the personal estate assessed to each one, including the amount of the collectible debts due to him, except debts secured by mortgage on real estate in this State, the amount allowed by the Assessor as a deduction from such value for

debts due and owing by the taxpayer, and for exemptions, and the net value of personal property assessed to each person."

15. Said reply to said letter of said Assessor was intended to constitute and did constitute a rendition by said plaintiff of such true account in response to said application of said Assessor and it was received as such by said assessor who had theretofore inspected all tangible personal property of plaintiff in said Township.

16. An assessment against plaintiff on account of personal property for the taxing year 1941 was made by defendant Davis as said Assessor, and the 1941 Assessment List and the Duplicate thereof which included said assessment were corrected, revised and completed by the said Somerset County Board of Taxation and the Assessor's list and the duplicate showing said assessment filed and delivered under and pursuant to the aforesaid statutes and at the times therein required, and as thus made and as thus corrected, revised and completed said assessment was for and upon a valuation of $150,000; the taxes in respect of said assessment were in the total amount of $4,650, of which the sum of $2,340 was paid in equal installments on February 5, 1941 and May 7, 1941 and the residue thereof has not yet become due; and until the matters and things hereinafter alleged, there has never been, by notice, application, complaint, hearing, revision, correction or otherwise, any question of said assessment or any attempt to increase the same in the manner prescribed by the statute in such case made and provided, or any attempt to add omitted personal property for the taxing year 1941 by said Assessor, or by said Collector, or by the said Somerset County Board of Taxation, or by any resident or taxpayer of said Township of Hillsborough.

Complaint

17. Under the Statutes of New Jersey, the Somerset County Board of Taxation, after April 1, 1940, was without jurisdiction or authority to make or direct an assessment against plaintiff for the taxing year 1940 upon or with respect to any omitted personal property of plaintiff, either individually or as such trustee except upon the written complaint, with the five days notice and after the prior examination and hearing consequent upon said complaint and notice which are specified and required in Sec. 54:3-20 of the Revised Statutes of New Jersey, and said Board, after April 1, 1941, was without jurisdiction or authority to make or direct an assessment against plaintiff for the taxing year 1941 upon or with respect to any omitted personal property of plaintiff, either individually or as such trustee, except upon the written complaint, with the five days notice and after the prior examination and hearing consequent upon said complaint and notice which are specified in Sec. 54:3-20 of the Revised Statutes of New Jersey. Nor did said Somerset County Board of Taxation, after April 1 of the tax year involved, have any jurisdiction or authority, by way of said complaint and notice and prior examination and hearing, to assess a tax against plaintiff for or with respect to any omitted personal property for such tax year, unless the same was omitted by inadvertence.

18. On or about June 27, 1941, Walter C. Linbarger, Secretary of said Somerset County Board of Taxation, wrote plaintiff a letter dated June 27, 1941, addressed to said plaintiff at Duke Farms, Hillsborough Township, Somerset County, New Jersey, enclosing a certified copy of a resolution and of a certain exhibit referred to therein as Schedule A thereto annexed, adopted by said Board on June 26, 1941 for and with respect to the taxing year 1940, and also enclosing a certified copy of a resolution and a

certain exhibit referred to therein as Schedule A thereto annexed, adopted by said Board on June 26, 1941 for and with respect to the taxing year 1941. True and complete copies of said letter and of said resolutions and schedules are hereto annexed as a part hereof, marked respectively Exhibits 1, 2 and 3.

19. On or about June 27, 1941, Walter C. Linbarger, Secretary of said Somerset County Board of Taxation, wrote said plaintiff as Trustee of the Duke Endowment a letter dated June 27, 1941, addressed to said plaintiff as such Trustee at Duke Farms, Hillsborough Township, Somerset County, New Jersey, enclosing a certified copy of a resolution and of a certain exhibit therein referred to as Schedule A thereto annexed, adopted by said Board on June 26, 1941 for and with respect to the taxing year 1940, and also enclosing a certified copy of a resolution and of a certain exhibit referred to therein as Schedule A thereto annexed, adopted by said Board on June 26, 1941 for and with respect to the taxing year 1941. True and complete copies of said letter and of said resolutions and schedules are hereto annexed as a part hereof, marked respectively Exhibits 4, 5 and 6.

20. Each of said letters, besides enclosing said certified copies of resolutions and of the schedules thereto annexed as aforesaid, further stated "that the next regular meeting of said Board will be on Monday, July 14, 1941 at 10:30 A. M., D. S. T. at the Court House, Somerville, N. J."

21. An inspection of said certified resolutions shows that in and by each of them said Somerset County Board of Taxation on June 26, 1941 (when composed of defendants Lifgren, Davenport and Soriano, acting in their capacity as members of said Board), upon an application in writing made on June 16, 1941 by defendant Horner as "a resident and taxpayer of the taxing district of the Town-

ship of Hillsborough, in the County of Somerset and the duly authorized Collector of Taxes for said Township", and the proofs in support thereof, "reached its determination" and thereby did "adjudge and determine" that said plaintiff was "a resident and inhabitant of Hillsborough Township, Somerset County, New Jersey" on October 1, 1939 and October 1, 1940, that "the taxable intangible personal property held by" said plaintiff, individually and as Trustee of the Duke Endowment, on said dates had been "entirely omitted by the Assessor of Hillsborough Township from the assessment of property in said Township" for the taxing years 1940 and 1941, and thereupon said Board did by said resolutions order:

> (a) That omitted intangible personal property in the amount of $60,054,424, as appears on the schedules annexed to the certified copies of said resolutions "be and the same is hereby assessed against the said" plaintiff and "same is hereby ordered to be entered on the tax duplicate of Hillsborough Township" for each of the taxing years 1940 and 1941; and
>
> (b) That omitted intangible personal property in the amount of $161,886,014, as appears on the schedules annexed to the certified copies of said resolutions, "be and the same is hereby assessed against the said" plaintiff "as Trustee of the Duke Endowment and the same is hereby ordered to be entered on the tax duplicate of Hillsborough Township" for each of the taxing years 1940 and 1941.

22. Each of said resolutions further ordered that a certified copy thereof be furnished to the Collector of Taxes, to-wit, defendant Horner, for the said Township of Hillsborough, with direction that he enter upon the tax duplicate of said Township the said amount of taxes there-

by assessed against said plaintiff, individually and as such Trustee.

23. No notice whatever was given to or received by said plaintiff, either individually or as such Trustee, of the complaints of defendant Horner, or of any hearing thereon, or of any consideration thereof by said Somerset County Board of Taxation, or of the meeting of said Board at which the said resolutions were adopted on June 26, 1941. Said plaintiff was kept in entire ignorance of said complaints, and of any consideration thereof, and of any order upon or with respect to the same and no examination or hearing or opportunity for examination or hearing of any kind was or has been accorded plaintiff as respects said complaints, resolutions or assessments, either individually or as such trustee.

24. By reason of said resolutions and the assessments thereby made and directed, defendant Horner, as such Collector, under date of June 30, 1941, has written to said plaintiff a letter addressed to her at Somerville, New Jersey, and reading as follows:

"C. G. Horner, Collector
of
Hillsborough Township

Neshanic, N. J., R. D. 1, June 30, 1941.

Mrs. Doris Duke Cromwell
Somerville, New Jersey

Dear Mrs. Cromwell:

Enclosed please find tax bills for personal property taxes in accordance with assessment determined

and fixed by the Somerset County Board of Taxation for the taxing years of 1940 and 1941.

Please take notice that interest and penalty at the rate of 6% per annum are running from the date of this bill.

Please take further notice that this letter is a formal demand for payment of the within bill forthwith and unless payment is received accordingly, I will be obliged to proceed pursuant to law.

Very truly yours,

(signed) CHRISTOPHER G. HORNER
Christopher G. Horner
Collector
Hillsborough Township"

CGH:KS

Photostatic copies of the face and of the reverse of the said two tax bills enclosed in said letter are hereby attached as a part hereof, marked Exhibits 7, 8, 9 and 10, respectively. Said tax bills show personal liabilities of $1,873,698.02 and $1,861,687.14 against plaintiff individually for the years 1940 and 1941 respectively based on said assessments against plaintiff individually for said intangible personal property in the value of $60,054,424 for each of the taxing years 1940 and 1941, making a total personal liability of said plaintiff individually for said two years of $3,735,385.16 by reason of said resolutions and the assessments therein against her individually.

25. By reason of said resolutions and the assessments thereby made and directed, defendant Horner, as such Collector, under date of June 30, 1941 has written to said plaintiff as Trustee of the Duke Endowment a letter ad-

dressed to her as such trustee at Somerville, New Jersey, and reading as follows:

"C. G. HORNER, Collector
of
Hillsborough Township

Neshanic, N. J., R. D. 1 June 30, 1941.

Mrs. Doris Duke Cromwell
Trustee of The Duke Endowment
Somerville, New Jersey

Dear Mrs. Cromwell:

Enclosed please find tax bills for personal property taxes in accordance with assessment determined and fixed by the Somerset County Board of Taxation for the taxing years of 1940 and 1941.

Please take notice that interest and penalty at the rate of 6% per annum are running from the date of this bill.

Please take further notice that this letter is a formal demand for payment of the within bill forthwith and unless payment is received accordingly, I will be obliged to proceed pursuant to law.

Very truly yours,

(signed) CHRISTOPHER G. HORNER
Christopher G. Horner
Collector
Hillsborough Township"

CGH:KS

Photostatic copies of the face and of the reverse of the said two tax bills enclosed in said letter are attached as

a part hereof, marked Exhibits 11, 12, 13 and 14, respectively. Said tax bills show liabilities of $5,050,843.63 and $5,018,466.43 against plaintiff as such trustee for the years 1940 and 1941 respectively, based on said assessments against plaintiff as such trustee for said intangible personal property in the value of $161,886,014 for each of the taxing years 1940 and 1941, making a total liability of said plaintiff as such trustee for said two years of $10,069,310.06 by reason of said resolutions and the assessments therein against her as such trustee.

26. Plaintiff alleges that although the letters from said Secretary enclosing certified copies of the said resolutions stated that the next regular meeting of said Somerset County Board of Taxation would be held in Somerville, New Jersey, on July 14, 1941, said Somerset County Board of Taxation intended and considered said resolutions, and each of them, as constituting final determinations and assessments, and said Board by said letters or otherwise did not intend to suspend the collection of the taxes that might be owing in respect of said assessments or to afford plaintiff any opportunity to be heard before said assessments became final; that long before the time set for such meeting defendant Horner, as such Collector, demanded payment of and thereby attempted to collect the taxes in respect of said assessments made in and by said resolutions and threatened the pains and penalties of the law for nonpayment thereof. Thus and thereby said Collector under and pursuant to the said resolutions of said Board, with the knowledge and approval of said Board, is treating each determination and assessment in and by each of said resolutions as a final determination and assessment, notwithstanding the statements of said letters as to the time and place of the next regular meeting of said Board, and is

treating the taxes assessed as directed by said resolutions as such liability of plaintiff, individually and as such trustee, as aforesaid and as due and owing and subject to interest and giving rise to the remedies of distraint and sale, and arrest and imprisonment as hereinafter set forth.

27. By the terms of Sec. 54:4-1 of the Revised Statutes of New Jersey any person "assessed for personal property shall be personally liable for the taxes thereon"; by virtue of said section an assessment for taxes upon and with respect to personal property, including an assessment for omitted personal property, constitutes the imposition at the time of said assessment of a personal liability upon the owner of said personal property who is assessed with taxes upon and with respect thereto.

By Sec. 54:4-80 a copy of the entry of the tax thus assessed upon and with respect to personal property, certified by the Collector to be a true copy taken from his duplicate, "shall be a sufficient warrant for the distress and sale or arrest and imprisonment authorized by Secs. 54:4-78 and 54:4-79 of this Title".

By Sec. 54:4-78 the Collector is authorized, in case of failure to pay a tax assessed upon or with respect to personal property when the same becomes due to enforce the payment thereof "by distress and sale of any of the goods and chattels" of the person liable for such tax.

By Sec. 54:4-79 if goods and chattels of the person liable for the tax on personal property cannot be found, or are not sufficient to make all the money required for the payment of such tax, "the Collector may in person or by deputy take the body of the delinquent and unless the tax is at once paid with costs, deliver him to the sheriff or jailer of the county, to be kept in close and safe custody" until payment be made, with costs.

28. Sec. 54:3-20 of the Revised Statutes of New Jersey provides that "on the written complaint of the Collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the County Board, on five days' notice in writing to the owner by the party complaining and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing, a transcript whereof shall be furnished by the Board to the Collector, who shall amend his duplicate accordingly."

29. While the assessments purported to be made by said resolutions were upon, and initiated by, the written complaints of defendant Horner as a resident and taxpayer of the taxing district of said Township of Hillsborough and as the duly authorized Collector of Taxes for said Township, and each of said resolutions so recites, and further recites that after consideration of the said complaints and due inquiry and examination the Board reached its determinations and adjudged and determined as therein set forth, plaintiff alleges that there was a total lack of compliance with the requirements of Sec. 54:3-20 in that there was not given to plaintiff either individually or as such trustee the five days' notice in writing, and there did not occur the hearing specified and required by said Sec. 54:3-20 for the addition of omitted property. On account of such failure to give the notice and to accord and have the hearing specified and required by said Sec. 54:3-20; said Somerset County Board of Taxation was wholly without jurisdiction in the premises, and the said orders, entered on June 26, 1941 and each of the same are totally invalid and of no effect.

30. Each of said orders purports to assess plaintiff individually or as Trustee with a tax upon and with respect to intangible personal property solely by reason of the alleged residence of said plaintiff within said Township of Hillsborough on October 1, 1939 and October 1, 1940. No one of said resolutions finds or determines or purports to find or determine that the said intangible personal property or any part thereof had a location or situs of its own in said Township of Hillsborough on said dates or at any other time. Plaintiff alleges that none of the said intangible personal property has at any time had a location or situs of its own in said Township.

31. No one of said resolutions finds or determines, or purports to find or determine, that plaintiff was an inhabitant of said Township of Hillsborough or of the State of New Jersey on June 26, 1941, when said Somerset County Board of Taxation attempted through and by means of the resolutions entered by it on said day to impose such liabilities upon plaintiff, individually or as such Trustee, by way of said assessments upon and with respect to said intangible personal property as set forth in said resolutions.

32. By reason of the aforesaid facts and circumstances said Somerset County Board of Taxation was without jurisdiction or authority on June 26, 1941 in and by said resolutions or any of them or otherwise to impose upon the plaintiff, either individually or as Trustee of the Duke Endowment, any such liabilities through said attempted assessments upon or with respect to said intangible personal property or otherwise, and the said attempt in and by said resolutions and each of them to assess said taxes and thereby impose such liabilities upon said plaintiff, either

individually or as such Trustee, was and is an attempt to extend the taxing jurisdiction and power of said Board beyond the territorial limits of the Township of Hillsborough and of the County of Somerset and of the State of New Jersey and to tax persons and personal property and things, and such plaintiff although a non-resident as aforesaid individually and as such trustee upon and with respect to persons, personal property and things, wholly beyond the jurisdiction and taxing power of said Township, County and State, and said attempt and said purported assessments were in contravention of the due process clause of the 14th Amendment to the Federal Constitution and a denial to plaintiff, individually and as such Trustee, of the due process of law secured to her thereby, and on that account said resolutions and the purported assessments therein set forth and each of them are wholly unconstitutional, invalid and void.

33. Said Duke Endowment is a common law trust created by James B. Duke by written indenture dated the 11th day of December 1924 and executed and delivered by him on that day and is devoted exclusively to charitable purposes.

Under the terms of said indenture all of the corpus of said trust is held exclusively for, and all of the incomes, revenues and profits of said trust must be utilized exclusively for, charitable, benevolent, religious and hospital purposes within the States of North Carolina and South Carolina, and should said funds prove more than sufficient for that purpose then for such purposes in other States of the United States, preferring those contiguous to said States of North Carolina and South Carolina.

Said trust is administered by a self-perpetuating Board of fifteen Trustees under and in accordance with the terms

of said indenture and the by-laws authorized of said indenture, which have been adopted by said Board for that purpose. Since plaintiff became 21 years of age she has been one of said Trustees, but she has never had, and does not now have, any personal or beneficial interest in either the corpus or the incomes, revenues and profits of said Duke Endowment and she does not now have, nor has she ever had, any possession or custody or control of the securities or personal property of said Duke Endowment, or any part thereof, or the evidences thereof, or any right to bring or cause to be brought the said properties or any part thereof or the evidences thereof into her possession, custody or control.

Said Board of Trustees under and in accordance with the terms of said indenture and said by-laws acts through meetings held at stated periods, at which a quorum must be present and a majority vote of those present prevails. According to the terms of said indenture and said by-laws said Board of Trustees has a Chairman, two Vice-Chairmen, a Secretary, and a Treasurer, none of which offices has ever been held by plaintiff.

The Treasurer of said trust is a Trustee of said Endowment and has been a Trustee and such Treasurer since the creation of said trust. By the terms of said by-laws all of the securities and other intangible personal property, and the evidences thereof, of said trust are committed, and from the creation of the trust have been committed, to the possession, custody and keeping of said Treasurer, who is now, and since the creation of said trust has been, a resident and inhabitant of the State of New York. In said State of New York during the whole period of the existence of said Duke Endowment said Treasurer has kept and does now keep all of said securities and personal prop-

erty of the Duke Endowment and all the evidences thereof in his control, custody and possession under and pursuant to said by-laws. None of said securities or personal property or the evidences thereof has ever been in the State of New Jersey.

Under and in accordance with said indenture and said by-laws at least ten meetings of said Board of Trustees must be held in each calendar year and said meetings are held alternately at the executive offices of said Duke Endowment, which are and from the creation of said Endowment have been in the City of New York in the State of New York and in the City of Charlotte in the State of North Carolina. No meeting of the Board of Trustees has ever been held in the State of New Jersey. All actions required and taken for the acquisition or disposition of securities and personal property or of the incomes, revenues and profits of said trust must be, and always have been, taken at said meetings of said Board of Trustees.

By reason of the foregoing facts said securities and personal property of and belonging to said Duke Endowment and the evidences thereof have, and always have had, since the creation of said trust, a distinct and permanent location and legal situs outside of the State of New Jersey and in the State of New York where the same have been constantly kept in the custody, control and possession of the Treasurer of said trust under and in accordance with said indenture and said by-laws, and none of them has ever had a location or situs within said State of New Jersey or within any taxing district thereof; and therefore the attempt of said Somerset County Board of Taxation in and by said resolutions of June 26, 1941 to assess taxes against said plaintiff as Trustee of said Endowment for the tax years 1940 and 1941 upon and with respect to intangible

personal property belonging to said Duke Endowment was and is an attempt to extend the taxing jurisdiction and power of said Board beyond the territorial limits of the Township of Hillsborough, and of the County of Somerset and of the State of New Jersey and to tax personal property and things, and said plaintiff as such Trustee upon and with respect to personal property and things, wholly beyond the jurisdiction and taxing authority of said Township of Hillsborough, of said Somerset County, and of the State of New Jersey, and said attempt and said purported assessments are in contravention of the due process clause of the 14th Amendment to the Constitution of the United States and a denial of the due process of law secured thereby and wholly unconstitutional, invalid and void.

34. Art. IV, Sec. 7, Par. 12, of the Constitution of the State of New Jersey provides:

> "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

The General Tax Act of the State of New Jersey entitled "An Act for the Assessment and Collection of Taxes" (R. S. 54:4-1) provides:

> "All property, real and personal, within the jurisdiction of this State not expressly exempted from taxation or expressly excluded from the operation of this Chapter shall be subject to taxation annually under this Chapter at its true value, and shall be valued by the Assessors of the respective Taxing Districts * * *."

Sec. 54:4-48 of the Revised Statutes of the State of New Jersey provides:

"The county board of taxation shall enter all changes or additions on the various tax lists and duplicates, and, upon ascertaining the total amount of tax to be raised, fix and adjust the amount of state school, state and county tax to be levied in each taxing district in the county in proportion to the respective values thereof, and the amount to be levied in each taxing district for local purposes as certified to it. It shall cause each assessor to enter in appropriate columns upon the tax lists and duplicates for his respective taxing district the net corrected value assessed to each person for both real and personal property, and to enter the addition of the items of each column at the foot thereof, on every page, the rates per dollar, which shall be such as according to the valuation on the duplicate will be sufficient to produce the sum required, and to extend on the duplicates the amount of tax computed on each assessment at that rate."

35. According to the Abstract of Ratables and Exemptions in the County of Somerset for the taxing year 1940, the net valuation of all taxable property, both real and personal, taxable in said Township of Hillsborough amounted to $3,117,863, of which the value of the personal property taxable in said Township amounted to $534,235. The amount of taxes required to be raised for State, County and Township purposes for said year by said aggregate ratables of $3,117,863 was $96,775.20. The tax rate fixed by said Somerset County Board of Taxation pursuant to said R. S. 54:4-48 for the said Township of Hillsborough for the year 1940 was $3.12 for each $100 valuation. By the application of said rate to said aggregate ratables of $3,-

117,863 said tax requirement of $96,775.20 for 1940 of said Township of Hillsborough was raised and collected.

36. According to the Abstract of Ratables and Exemptions in the County of Somerset for the taxing year 1941, the net valuation of all taxable property, both real and personal, taxable in said Township of Hillsborough amounted to $3,139,020, of which the value of the personal property taxable in said Township amounted to $537,210. The amount of taxes required to be raised for State, County and Township purposes for said year by said aggregate ratables of $3,139,020 was $96,726.44. The tax rate fixed by said Somerset County Board of Taxation pursuant to said R. S. 54:4-48 for the said Township of Hillsborough for the year 1941 was $3.10 for each $100 valuation. By the application of said rate to said aggregate ratables of $3,139,020 said tax requirement of $96,726.44 for 1941 of said Township of Hillsborough is being raised and collected.

37. Plaintiff alleges that in and by said resolutions and the assessments thereby made said Somerset County Board of Taxation is attempting (1) to add approximately $222,000,000 to the $3,117,863 of ratables for the taxing year 1940 and thereby to increase said ratables by some 7,100%; and (2) to add approximately $222,000,000 of ratables to the $3,139,020 of ratables for the taxing year 1941 and thereby to increase said ratables also by some 7,100%.

38. Plaintiff alleges that by said addition to said ratables the personal liability of plaintiff on account of taxes for personal property in said Township is attempted to be raised for 1940 some 40,000% from $4,680 to $1,873,698.02, and in addition to exact from plaintiff as such

Trustee the sum of $5,050,843.63; and for the year 1941 likewise some 40,000% from $4,650 to $1,861,687.14, and in addition to exact from plaintiff as such Trustee the sum of $5,018,466.43.

39. Plaintiff alleges that defendant Horner as such Collector by reason of the assessments attempted to be made in and by said resolutions is demanding, as hereinbefore stated, under the pains and penalties of the statutes in such case made and provided (1) the payment by plaintiff, individually and as such Trustee, respectively, of the said taxes by reason of said assessments in the aggregate sum of $6,924,541.65 for the tax year 1940, as contrasted with the total tax requirements for said year of said Township of Hillsborough of $96,775.20, and notwithstanding said tax requirements had been fully raised and there is no additional tax requirement for the year 1940; and (2) the payment by plaintiff, individually and as such Trustee, respectively, of said taxes by reason of said assessments in the aggregate sum of $6,880,153.57 for the tax year 1941, as contrasted with the total tax requirements of said Township for said year of $96,726.44, notwithstanding said tax requirements are being raised and there is no additional tax requirement for the year 1941.

40. Plaintiff alleges that had the amount of said assessments been included in the tax ratables for said years 1940 and 1941 either by said Assessor or by said County Board under its powers of revision under R. S. 54:4-47 the tax rates for said years, in the light of the tax requirements for such years, would have been but a small fraction of said tax rates of $3.12 and $3.10 respectively and the taxes to be paid on account of such assessments would likewise have been only a small part of the amounts now sought to be collected.

41. The assessing authorities of the taxing district of the Township of Hillsborough and the assessing authorities generally throughout the taxing districts of the County of Somerset and of the other taxing districts and counties of the State of New Jersey, and the County and State authorities charged with the duty of revising, correcting and equalizing assessments, have consistently, systematically, intentionally and notoriously failed to assess at true value, or at all, the intangible personal property owned by taxpayers generally as required by the Constitution and Statutes of the State of New Jersey in such case made and provided. Nevertheless, said purported assessments of $60,054,424 against said plaintiff individually for and with respect to intangible personal property for each of the years 1940 and 1941 and said purported assessments of $161,886,014 against said plaintiff as such Trustee for and with respect to intangible personal property for each of the years 1940 and 1941, and each of them, were fixed at what said Somerset County Board of Taxation determined to be the true value as of October 1, 1939 and October 1, 1940, as the case may be, of the intangible personal property involved in said assessments. In and by said purported assessments said Somerset County Board of Taxation and defendants Lifgren, Davenport and Soriano in their capacity as members thereof, and defendant Horner in his capacity as Collector of said Township of Hillsborough, have deliberately singled out the plaintiff, individually and as such Trustee, with the intent and for the purpose of imposing a tax grossly disproportionate to the taxes imposed upon other taxpayers in said Township of Hillsborough and County of Somerset and State of New Jersey and have thereby attempted to impose upon said plaintiff, individually and as such Trustee, a crushing and discriminatory burden of taxation grossly disproportionate to the taxes

imposed upon other taxpayers. By reason of said purported assessments and the other facts and circumstances herein alleged, the plaintiff, individually and as such Trustee, is unjustly, arbitrarily and fraudulently discriminated against, or is threatened so to be, and an enormous, illegal, excessive, discriminatory and disproportionate burden of taxation is being and will be imposed and made to fall upon said plaintiff, both individually and as such Trustee, or is threatened so to be, for each of said tax years by the State of New Jersey, by the County of Somerset, and by the Township of Hillsborough, without remedy therefor under the laws and decisions of the State of New Jersey, in violation of the Statutes and Constitution of said State, and in such manner as to deprive plaintiff, individually and as such Trustee, of her property without due process of law, and to deny to plaintiff, individually and as such Trustee, the equal protection of the laws in contravention of the 14th Amendment to the Constitution of the United States, and on that account said purported assessments and each of them is wholly unconstitutional, invalid and void.

42. Plaintiff alleges that said singling out of the plaintiff and said threatened discrimination against her, both individually and as such Trustee, was at the instigation of one Alfred L. Kirby, a tax ferret and informer, widely known as such in the State of New Jersey, for the personal gain of said Kirby; that the means employed by said Kirby for such instigation is an arrangement between him and the said Township of Hillsborough, whereby said Kirby undertakes to indemnify and save harmless said Township from and against all cost and expense, including counsel fees, arising from or with respect to said purported assessments and the collection of the taxes arising from said assessments and whereby said Kirby is to receive as his compen-

sation a substantial percentage of all taxes which may be collected under or by reason of said purported assessments; that acting under said arrangement said Kirby succeeded in persuading the taxing authorities of said Township and County to single out said plaintiff, individually and as such Trustee, for a method and basis of taxation different from that accorded other taxpayers of said Township and County, by the addition of said intangible property to the ratables for said years as omitted property and thereby attempt to impose these enormous liabilities upon plaintiff, individually and as such Trustee, notwithstanding such nonresidence of said plaintiff and the situs of said intangible property outside of the State of New Jersey, because such action by said taxing authorities was without risk of loss or expense to said Township or to said County from so doing and was at a time and in a manner which would not reduce the tax rate for said years or increase the ratables subject to said tax rate in peril of subsequent reduction of the ratables and tax collections in the event of successful resistance to said assessments by said plaintiff, either individually or as such Trustee; and thereby said Kirby succeeded in magnifying to the prodigious proportions aforesaid the purported assessments and taxes and his opportunity for personal gain and profit therefrom.

43. Plaintiff denies that on Octoer 1, 1939 or on October 1, 1940 or on June 26, 1941 she individually owned or held taxable intangible personal property to the value of $60,054,424; and further denies that she as Trustee of the Duke Endowment or that said Duke Endowment owned or held taxable intangible personal property to the value of $161,886,014 on any of such dates.

WHEREFORE, the plaintiff, individually and as such Trustee, asks for a judgment of this Court declaring:

(1) That said purported assessments, attempted to be imposed in and by the resolutions adopted by said Somerset County Board of Taxation on June 26, 1941, and each of said assessments, are wholly invalid and void because beyond the taxing power and jurisdiction of said Township of Hillsborough and said Somerset County Board of Taxation and the taxing officials thereof, in contravention of the due process clause and the equal protection clause of the 14th Amendment to the Constitution of the United States, and also in contravention of the applicable provisions of the Constitution and Statutes of the State of New Jersey; and

(2) That the plaintiff, individually and as such Trustee, have the costs of this suit.

PITNEY, HARDIN & SKINNER,

SHELTON PITNEY,
WILLIAM J. BRENNAN, JR.,
Attorneys of Plaintiff.

Post Office Address:
744 Broad Street,
Newark, New Jersey.

Exhibit 1, Annexed to Complaint

COMMISSIONERS:

WILLIAM LIFGREN, President
W. W. DAVENPORT, JR., Vice-President
ANGELO SORIANO

SOMERSET COUNTY BOARD OF TAXATION

COURT HOUSE

WALTER C. LINBARGER, Secretary

Telephone Somerville 1634

SOMERVILLE, NEW JERSEY
June 27, 1941.

Mrs. Doris Duke Cromwell
Duke Farms, Hillsborough Township
Somerset County, New Jersey

Dear Madam:

Herewith are enclosed true copies of two resolutions adopted by the Somerset County Board of Taxation at its meeting held June 26, 1941, relating to omitted assessments against you for the years 1940 and 1941.

Please note that the next regular meeting of said Board will be on Monday, July 14, 1941, at 10:30 A. M., D. S. T., at the Court House, Somerville, N. J.

Yours truly,

WALTER C. LINBARGER,
Secy.

Walter C. Linbarger, Secretary
Somerset County Board of Taxation

Enc.
Certified copies of
resolutions re omitted
assessments 1940 and 1941.

Exhibit 2, Annexed to Complaint

RESOLUTION.

WHEREAS, on June 16, 1941, application in writing was made by Christopher G. Horner, a resident and taxpayer of the taxing district of the Township of Hillsborough in the County of Somerset and the duly authorized Collector of Taxes for said Township, which said application was supported by proofs, whereby it appears that on October 1st, 1939, certain intangible personal property owned by Mrs. Doris Duke Cromwell was taxable in the taxing district of said Hillsborough Township and more particularly specified in the schedule hereto annexed and made a part hereof, and that the same was entirely omitted from assessment by the said Township of Hillsborough for the taxing year of 1940, and,

WHEREAS, after careful consideration of the application and proof and after due inquiry and examination into this matter, this Board has reached its determination, now therefore,

BE IT RESOLVED by the Somerset County Board of Taxation and the said Board does hereby adjudge and determine that, Mrs. Doris Duke Cromwell was on October 1st, 1939, a resident and inhabitant of Hillsborough Township, Somerset County, New Jersey, and that the taxable intangible personal property held by said Mrs. Doris Duke Cromwell, was, on October 1st, 1939, entirely omitted by the Assessor of Hillsborough Township from the assessment of property in said Township for the taxing year of 1940, and further,

BE IT RESOLVED that the omitted property in the amount of $60,054,424.00, as appears on the schedule hereto annexed and made a part hereof, be and the same is hereby assessed against the said Mrs. Doris Duke Cromwell, and same is hereby ordered to be entered on the tax duplicate

Exhibit 2, Annexed to Complaint

of Hillsborough Township for the taxing year of 1940, assessed to said Mrs. Doris Duke Cromwell, and further,

BE IT RESOLVED that immediate notice of the entry of this assessment be given to the aforesaid Mrs. Doris Duke Cromwell by the mailing of a copy of this resolution, certified by the Secretary as a true copy, together with a notice of the time and place of the next regular meeting of this Board to be held at 10:30 A. M., D. S. T. on Monday, July 14, 1941, at Somerset County Court House, Somerville, N. J., said mailing to be by registered mail, return receipt requested, to said Mrs. Doris Duke Cromwell, at Duke Farms, Hillsborough Township, Somerset County, New Jersey, and further,

BE IT RESOLVED that a certified copy of this resolution be furnished to the Collector of Taxes for the Township of Hillsborough aforesaid, with direction that he enter upon the tax duplicate of said Township the said amount hereby assessed.

SOMERSET COUNTY BOARD OF TAXATION
William Lifgren Pres.

W. W. Davenport, Jr., V. P.
Angelo R. Soriano

Attest:

WALTER C. LINBARGER
Walter C. Linbarger, Secretary

I, Walter C. Linbarger, Secretary of the Somerset County Board of Taxation, do hereby certify the foregoing to be a true and correct copy of the original resolution adopted by said Board on June 26, 1941.

s/ WALTER C. LINBARGER
Walter C. Linbarger, Secretary

Exhibit 3, Annexed to Complaint

Schedule A

Schedule A annexed to Exhibit 2 is an itemized list of specific intangible personal property owned by Mrs. Doris Duke Cromwell, an inhabitant and resident of Duke Farms, Hillsborough Township, Somerset County, New Jersey, as of October 31, 1939.

The itemization of such property, consisting of cash, notes, interest, dividends receivable, stocks and bonds, totaling $60,054,424.00 is omitted from this appendix.

Exhibit 3, Annexed to Complaint

RESOLUTION

WHEREAS, on June 16, 1941, application in writing was made by Christopher G. Horner, a resident and taxpayer of the taxing district of the Township of Hillsborough in the County of Somerset and the duly authorized Collector of Taxes for said Township, which said application was supported by proofs, whereby it appears that on October 1st, 1940, certain intangible personal property owned by Mrs. Doris Duke Cromwell was taxable in the taxing district of said Hillsborough Township and more particularly specified in the schedule hereto annexed and made a part hereof, and that the same was entirely omitted from assessment by the said Township of Hillsborough for the taxing year of 1941, and,

WHEREAS, after careful consideration of the application and proof and after due inquiry and examination into this matter, this Board has reached its determination, now therefore,

Exhibit 3, Annexed to Complaint

BE IT RESOLVED by the Somerset County Board of Taxation and the said Board does hereby adjudge and determine that, Mrs. Doris Duke Cromwell was on October 1st, 1940, a resident and inhabitant of Hillsborough Township, Somerset County, New Jersey, and that the taxable intangible personal property held by said Mrs. Doris Duke Cromwell, was, on October 1st, 1940, entirely omitted by the Assessor of Hillsborough Township from the assessment of property in said Township for the taxing year of 1941, and further,

BE IT RESOLVED that the omitted property in the amount of $60,054,424.00, as appears on the schedule hereto annexed and made a part hereof, be and the same is hereby assessed against the said Mrs. Doris Duke Cromwell, and same is hereby ordered to be entered on the tax duplicate of Hillsborough Township for the taxing year of 1941, assessed to said Mrs. Doris Duke Cromwell, and further,

BE IT RESOLVED that immediate notice of the entry of this assessment be given to the aforesaid Mrs. Doris Duke Cromwell by the mailing of a copy of this resolution, certified by the Secretary as a true copy, together with a notice of the time and place of the next regular meeting of this Board to be held at 10:30 A. M., D. S. T. on Monday, July 14, 1941, at Somerset County Court House, Somerville, N. J., said mailing to be by registered mail, return receipt requested, to said Mrs. Doris Duke Cromwell, at Duke Farms, Hillsborough Township, Somerset County, New Jersey, and further,

BE IT RESOLVED that a certified copy of this resolution be furnished to the Collector of Taxes for the Township of Hillsborough aforesaid, with direction that he enter upon

the tax duplicate of said Township the said amount hereby assessed.

SOMERSET COUNTY BOARD OF TAXATION
William Lifgren Pres.

W. W. Davenport, Jr., V. P.
Angelo R. Soriano

Attest:

WALTER C. LINBARGER
Walter C. Linbarger, Secretary

I, Walter C. Linbarger, Secretary of the Somerset County Board of Taxation, do hereby certify the foregoing to be a true and correct copy of the original resolution adopted by said Board on June 26, 1941.

s/ WALTER C. LINBARGER
Walter C. Linbarger, Secretary

Schedule A

Schedule A annexed to Exhibit 3 is an itemized list of specific intangible personal property owned by Mrs. Doris Duke Cromwell, an inhabitant and resident of Duke Farms, Hillsborough Township, Somerset County, New Jersey, as of October 1, 1940.

The itemization of such property, consisting of cash, notes, interest, dividends receivable, stocks and bonds, totaling $60,054,424.00 is omitted from this appendix.

Exhibit 4, Annexed to Complaint

COMMISSIONERS:

WILLIAM LIFGREN, President
W. W. DAVENPORT, JR., Vice-President
ANGELO SORIANO

SOMERSET COUNTY BOARD OF TAXATION

COURT HOUSE

WALTER C. LINBARGER, Secretary

Telephone Somerville 1634

SOMERVILLE, NEW JERSEY
June 27, 1941.

Mrs. Doris Duke Cromwell,
Trustee of The Duke Endowment,
Duke Farms, Hillsborough Township,
Somerset County, New Jersey.

Dear Madam:

Herewith are enclosed true copies of two resolutions adopted by the Somerset County Board of Taxation at its meeting held June 26th, 1941, relating to omitted assessments against you, as Trustee, for the years 1940 and 1941.

Please note that the next regular meeting of said Board will be on Monday, July 14, 1941, at 10:30 A. M., D. S. T., at the Court House, Somerville, N. J.

Yours truly,

WALTER C. LINBARGER,
Secy.

Walter C. Linbarger, Secretary
Somerset County Board of Taxation

Enc.
Certified copies of
resolutions re omitted
assessments 1940 and 1941.

Exhibit 5, Annexed to Complaint

RESOLUTION

WHEREAS, on June 16, 1941, application in writing was made by Christopher G. Horner, a resident and taxpayer of the taxing district of the Township of Hillsborough in the County of Somerset and the duly authorized Collector of Taxes for said Township, which said application was supported by proofs, whereby it appears that on October 1st, 1939, certain intangible personal property held by Doris Duke Cromwell, as Trustee of The Duke Endowment, was taxable in the taxing district of said Hillsborough Township and more particularly specified in the schedule hereto annexed and made a part hereof, and that the same was entirely omitted from assessment by the said Township of Hillsborough for the taxing year of 1940, and,

WHEREAS, after careful consideration of the application and proof and after due inquiry and examination into this matter, this Board has reached its determination, now therefore,

BE IT RESOLVED by the Somerset County Board of Taxation and the said Board does hereby adjudge and determine that, Doris Duke Cromwell was on October 1st, 1939, a resident and inhabitant of Hillsborough Township, Somerset County, New Jersey, and that the taxable intangible personal property held by said Mrs. Doris Duke tangible personal property held by her as Trustee of The Duke Endowment, was, on October 1st, 1939, entirely omitted by the Assessor of Hillsborough Township from the assessment of property in said Township for the taxing year of 1940, and further,

BE IT RESOLVED that the omitted property in the amount of $161,886,014.00, as appears on the schedule hereto an-

nexed and made a part hereof, be and the same is hereby assessed against the said Doris Duke Cromwell, as Trustee of The Duke Endowment and the same is hereby ordered to be entered on the tax duplicate of Hillsborough Township for the taxing year 1940, assessed to said Doris Duke Cromwell, as Trustee of The Duke Endowment, and further,

BE IT RESOLVED that immediate notice of the entry of this assessment be given to the aforesaid Doris Duke Cromwell, as Trustee of The Duke Endowment by the mailing of a copy of this resolution, certified by the Secretary as a true copy, together with a notice of the time and place of the next regular meeting of this Board to be held at 10:30 A. M., D. S. T. on Monday, July 14, 1941, at Somerset County Court House, Somerville, N. J., said mailing to be by registered mail, return receipt requested, to said Doris Duke Cromwell, as Trustee of The Duke Endowment, at Duke Farms, Hillsborough Township, Somerset County, New Jersey, and an additional certified copy of this resolution and notice of said next regular meeting to be mailed to the executive offices of The Duke Endowment at 30 Rockefeller Plaza, New York, New York, and further,

BE IT RESOLVED that a certified copy of this resolution be furnished to the Collector of Taxes for the Township of Hillsborough aforesaid, with direction that he enter upon the tax duplicate of said Township the said amount hereby assessed.

SOMERSET COUNTY BOARD OF TAXATION
William Lifgren Pres.

W. W. Davenport, Jr., V. P.
Angelo R. Soriano

Attest:

WALTER C. LINBARGER
Walter C. Linbarger, Secretary

Exhibit 5. Annexed to Complaint

I, Walter C. Linbarger, Secretary of the Somerset County Board of Taxation, do hereby certify the foregoing to be a true and correct copy of the original resolution adopted by said Board on June 26, 1941.

s/ WALTER C. LINBARGER
Walter C. Linbarger, Secretary

Schedule A

Schedule A annexed to Exhibit 5 is an itemized list of specific intangible personal property assessible against Doris Duke Cromwell as trustee of The Duke Endowment at Duke Farms, Hillsborough Township, Somerset County, New Jersey, as of October 1, 1939.

The itemization of such property, consisting of cash, notes, interest, dividends receivable, stocks and bonds, totaling $161,886,014.00 is omitted from this appendix.

Exhibit 6, Annexed to Complaint

RESOLUTION

WHEREAS, on June 16, 1941, application in writing was made by Christopher G. Horner, a resident and taxpayer of the taxing district of the Township of Hillsborough in the County of Somerset and the duly authorized Collector of Taxes for said Township, which said application was supported by proofs, whereby it appears that on October 1st, 1940, certain intangible personal property held by Doris Duke Cromwell, as Trustee of The Duke Endowment, was taxable in the taxing district of said Hillsborough Township and more particularly specified in the schedule hereto annexed and made a part hereof, and that the same was entirely omitted from assessment by the said Township of Hillsborough for the taxing year of 1941, and,

WHEREAS, after careful consideration of the application and proof and after due inquiry and examination into this matter, this Board has reached its determination, now therefore,

BE IT RESOLVED by the Somerset County Board of Taxation and the said Board does hereby adjudge and determine that Doris Duke Cromwell was on October 1st, 1940, a resident and inhabitant of Hillsborough Township, Somerset County, New Jersey, and that the taxable intangible personal property held by her as Trustee of The Duke Endowment, was, on October 1st, 1940, entirely omitted by the Assessor of Hillsborough Township from the assessment of property in said Township for the taxing year of 1941, and further,

BE IT RESOLVED that the omitted property in the amount of $161,886,014.00, as appears on the schedule hereto annexed and made a part hereof, be and the same is hereby

assessed against the said Doris Duke Cromwell, as Trustee of The Duke Endowment and the same is hereby ordered to be entered on the tax duplicate of Hillsborough Township for the taxing year 1941, assessed to said Doris Duke Cromwell, as Trustee of The Duke Endowment, and further,

BE IT RESOLVED that immediate notice of the entry of this assessment be given to the aforesaid Doris Duke Cromwell, as Trustee of The Duke Endowment by the mailing of a copy of this resolution, certified by the Secretary as a true copy, together with a notice of the time and place of the next regular meeting of this Board to be held at 10:30 A. M. D. S. T. on Monday, July 14, 1941, at Somerset County Court House, Somerville, N. J., said mailing to be by registered mail, return receipt requested, to said Doris Duke Cromwell, as Trustee of The Duke Endowment, at Duke Farms, Hillsborough Township, Somerset County, New Jersey, and an additional certified copy of this resolution and notice of said next regular meeting to be mailed to the executive offices of The Duke Endowment at 30 Rockefeller Plaza, New York, New York, and further,

BE IT RESOLVED that a certified copy of this resolution be furnished to the Collector of Taxes for the Township of Hillsborough aforesaid, with direction that he enter upon the tax duplicate of said Township the said amount hereby assessed.

SOMERSET COUNTY BOARD OF TAXATION
William Lifgren Pres.

W. W. Davenport, Jr., V. P.
Angelo R. Soriano

Attest:

WALTER C. LINBARGER
Walter C. Linbarger, Secretary

Exhibit 6, Annexed to Complaint

I, Walter C. Linbarger, Secretary of the Somerset County Board of Taxation, do hereby certify the foregoing to be a true and correct copy of the original resolution adopted by said Board on June 26, 1941.

s/ WALTER C. LINBARGER
Walter C. Linbarger, Secretary

Schedule A

Schedule A annexed to Exhibit 6 is an itemized list of specific intangible personal property assessible against Doris Duke Cromwell as trustee of The Duke Endowment at Duke Farms, Hillsborough Township, Somerset County, New Jersey, as of October 1, 1940.

The itemization of such property, consisting of cash, notes, interest, dividends receivable, stocks and bonds, totaling $161,886,014.00 is omitted from this appendix.

Exhibit 7, Annexed to Complaint

Exhibit 7 is a photostat of a tax bill for the year 1940 issued by the Township of Hillsborough to Mrs. Doris Duke Cromwell, Somerville, New Jersey, indicating a total tax of $1,873,698.02.

Exhibit 8, Annexed to Complaint

Exhibit 8 is a photostat of the reverse side of Exhibit 7.

Exhibit 9, Annexed to Complaint

Exhibit 9 is a photostat of a tax bill for the year 1941 issued by the Township of Hillsborough to Mrs. Doris Duke Cromwell, Somerville, New Jersey, indicating a total tax of $1,861,687.14.

Exhibit 10, Annexed to Complaint

Exhibit 10 is a photostat of the reverse side of Exhibit 9.

Exhibit 11, Annexed to Complaint

Exhibit 11 is a photostat of a tax bill for the year 1940 addressed to Mrs. Doris Duke Cromwell, trustee of The Duke Endowment, Somerville, New Jersey, indicating a total tax of $5,050,843.63.

Exhibit 12, Annexed to Complaint

Exhibit 12 is a photostat of the reverse side of Exhibit 11.

Exhibit 13, Annexed to Complaint

Exhibit 13 is a photostat of a tax bill for the year 1941 addressed to Mrs. Doris Duke Cromwell, trustee of The Duke Endowment, Somerville, New Jersey, indicating a total tax of $5,018,466.43.

Exhibit 14, Annexed to Complaint

Exhibit 14 is a photostat of the reverse side of Exhibit 13.

Answer

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment, *Plaintiff*, —*vs*— TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey; CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough; WILLIAM LIFGREN, W. W. DAVENPORT, JR. and ANGELO R. SORIANO, Somerset County Board of Taxation; and CHARLES V. N. DAVIS, Assessor of the Township of Hillsborough, *Defendants*.	Civil Action 1665

The defendants, Township of Hillsborough, Somerset County, New Jersey, Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, and Charles V. N. Davis, Assessor of the Township of Hillsborough, answering the complaint herein respectfully state as follows:

1. Defendants admit that plaintiff is a natural born citizen of the United States, but deny that plaintiff is a resident and inhabitant of the Territory of Hawaii, or that she is a citizen of said territory, but state that plaintiff is a citizen and inhabitant of the State of New Jersey and maintains her residence within the State of New Jersey.

Answer

2. Defendants admit the allegations of paragraph 2.

3. Defendants admit the allegations of paragraph 3.

4. Defendants admit the allegations of paragraph 4.

5. Defendants admit the allegations of paragraph 5.

6. Defendants deny that this is a suit within the scope or contemplation of the Federal Declaratory Judgment Act of June 14, 1934, as amended, and state that this court is without jurisdiction to grant the relief prayed for by the plaintiff under said act. Defendants further deny that this case arises under the Constitution of the United States or that it is a suit, action or controversy between a citizen of the Territory of Hawaii, as plaintiff, and citizens of the State of New Jersey, as defendants, but defendants state that it is a suit wholly between citizens of the State of New Jersey and for that reason, that this court is without jurisdiction in the premises. Defendants further deny that the District Court of the United States for the District of New Jersey has original jurisdiction for the purposes aforesaid of said suit, under and by virtue of the Federal Declaratory Judgment Act.

7. Defendants admit the allegations of paragraph 7.

8. Defendants admit the allegations of paragraph 8.

9. Defendants admit the allegations of paragraph 9.

10. Defendants deny the allegations of paragraph 10 and state that no assessment on account of personal property for the taxing year 1940 was made against the plaintiff, either individually or as Trustee of the Duke Endow-

ment by any of these defendants, nor was any tax paid by the plaintiff on account of any such alleged assessment.

11. Defendants admit the allegations of paragraph 11 with the exception that defendants deny plaintiff's domicile to be in the Territory of Hawaii.

12. In answer to paragraph 12 defendants admit the receipt by the defendant Charles V. N. Davis, as Assessor, of the letter therein set forth.

13. Defendants deny the allegations of paragraph 13 and state that plaintiff was a resident, inhabitant and citizen of the State of New Jersey on October 1, 1940 (and that she continued thereafter to be a resident, inhabitant and citizen of the State of New Jersey). Defendants further state that the situs of any and all intangible personal property owned or held by said plaintiff, either individually or as trustee, was on said date and has since remained within the Township of Hillsborough, in the State of New Jersey, and was therefore liable to taxation in said Township.

14. Defendants admit the allegations of paragraph 14.

15. Defendants deny the allegations of paragraph 15 and state that said reply to said letter of said Assessor did not constitute a true account by the plaintiff of her personal property, money, effects and credits, nor was it received as such by said Assessor.

16. Defendants deny the allegations of paragraph 16 and state that no assessment on account of personal property for the taxing year 1941 was made against the plaintiff by any of these defendants, nor was any tax paid by plaintiff on account of any such alleged assessment.

Answer

17. Defendants deny the allegations of paragraph 17 and state that under the provisions of Section 54:3-20 of the Revised Statutes of the State of New Jersey it is provided as follows: "The County Board of Taxation shall by resolution cause to be entered upon the tax duplicate a proper assessment against any property omitted by the Assessor. The Board shall then give immediate notice of such entry and of the time and place of its next meeting to the owner of the property affected and furnish a copy of the entry to the Clerk or Collector of the Taxing District, who shall enter it on his tax list." Defendants state further that by reason of the provisions of said Section, a mandatory duty was imposed upon the Somerset County Board of Taxation to make the assessments complained of and that said Board of Taxation fully complied with the provisions of said Section, as quoted above, and had full jurisdiction and authority to do so at the time that said assessments were made.

18. Defendants admit the allegations of paragraph 18.

19. Defendants admit the allegations of paragraph 19.

20. Defendants admit the allegations of paragraph 20.

21. Defendants admit the allegations of paragraph 21, but beg leave to refer to the original resolutions and proceedings of the Somerset County Board of Taxation.

22. Defendants admit the allegations of paragraph 22 and state that all acts performed by the defendant Christopher G. Horner as Collector of Taxes were done at the direction and under the authority of the Somerset County Board of Taxation, whose direction said defendant was by law bound to observe.

23. Defendants deny the allegations of paragraph 23 and state that notice was given to the plaintiff individually and as trustee, pursuant to the provisions of Section 54:3-20 of Revised Statutes of the State of New Jersey as quoted above. Defendants further state that plaintiff, through her counsel, did appear at the meeting of the Somerset County Board of Taxation held on July 14, 1941, pursuant to said notice.

24. Defendants admit the allegations of paragraph 24 and the writing of the letter therein referred to, but state that said letter was written in performance of the mandatory duty imposed by law upon the defendant Horner, as Collector.

25. Defendants admit the allegations of paragraph 25 and the writing of the letter therein referred to, but state that said letter was written in performance of the mandatory duty imposed by law upon the defendant Horner, as Collector.

26. Defendants deny the allegations contained in paragraph 26 and state that the procedure and proceedings of the Somerset County Board of Taxation were in accordance with the usual practice in such cases and in conformity with the law and statutes in such case made and provided. Defendants further state that plaintiff has a full and adequate remedy by appeal to the courts of the State of New Jersey to review said assessments, of which remedy plaintiff has not availed herself.

27. Defendants admit the allegations of paragraph 27, but beg leave to refer to the entire provisions of the statutes cited by plaintiff and to the other provisions of the Revised Statutes of the State of New Jersey respecting taxation.

28. Defendants deny that the provisions of Section 54:3-20 of the Revised Statutes of the State of New Jersey are as stated and quoted by plaintiff in paragraph 28, and defendants state that plaintiff has omitted material portions of said Section pertinent to this cause. Said Section provides as follows:

"54:3-20. Assessment of omitted property.

The county board of taxation shall, by resolution, cause to be entered upon the tax duplicate a proper assessment against any property omitted by the assessor. The board shall then give immediate notice of such entry and of the time and place of its next meeting to the owner of the property affected, and furnish a copy of the entry to the clerk or collector of the taxing district, who shall enter it on his tax list. On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining, and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing, a transcript whereof shall be furnished by the board to the collector, who shall amend his duplicate accordingly. The collector shall present such complaints and serve such notices as the governing body may direct and shall attend before the board and subpoena proper witnesses and pay their fees. He shall receive reimbursement therefor and two dollars for every day he shall attend for his services from the taxing district. Such proceedings may be brought within one year from the date when taxes on real property become a lien."

Answer

29. Defendants deny each and every allegation in paragraph 29 and state that the Somerset County Board of Taxation fully complied with the provisions of Section 54:3-20 as quoted above, and proceeded wholly in accordance with law and had full jurisdiction in the premises.

30. Defendants deny the allegations of paragraph 30 and state that the assessments against plaintiff, individually, were made against the plaintiff as a citizen and resident of the Township of Hillsborough, in the State of New Jersey; that plaintiff was on October 1, 1939 and on October 1, 1940, a citizen and resident of said Township of Hillsborough; and that the situs of said intangible personal property was on said dates within the Township of Hillsborough and within the taxing jurisdiction of said Township and therefore liable to said assessment and taxation. Defendants further state that the assessments made against plaintiff, as trustee, were made against plaintiff as a citizen and resident of the Township of Hillsborough in the State of New Jersey; that plaintiff was on October 1, 1939 and on October 1, 1940, a citizen and resident of said Township of Hillsborough; that the Duke Endowment was on said dates a New Jersey trust, having its legal situs in the Township of Hillsborough and the State of New Jersey; and that the situs of intangible personal property owned by said trust or by plaintiff as such trustee, was on said dates wholly within the Township of Hillsborough and within the taxing jurisdiction of said Township and therefore liable to assessment and taxation.

31. Defendants deny the allegations of paragraph 31 and state that no such determination or finding was required to be made by the Somerset County Board of Taxation.

Answer

32. Defendants deny the allegations contained in paragraph 32 and state that plaintiff, individually and as trustee, was a citizen and resident of the Township of Hillsborough in the State of New Jersey on October 1, 1939 and on October 1, 1940, and was subject to assessment and taxation with respect to intangible personal property under the laws of the State of New Jersey.

33. Defendants admit that the Duke Endowment is a common law trust of the State of New Jersey created by James B. Duke by written indenture dated December 11, 1924, and executed and delivered by him on that day. Defendants state that at the time of the creation of said trust and at the time of his death, the said James B. Duke was a citizen and resident of the Township of Hillsborough in the State of New Jersey, and had his domicile within said Township. By reason thereof the situs of all personal property belonging to said trust, including intangible personal property, was and is in the Township of Hillsborough aforesaid.

Defendants deny that said trust is devoted exclusively to charitable purposes and state further that said trust and the income and corpus thereof is not held for or devoted to religious, charitable, benevolent or eleemosynary purposes within the State of New Jersey and is not therefore exempt from taxation by the State of New Jersey.

Defendants deny that plaintiff has never had and does not now have any personal or beneficial interest in the corpus or the incomes, revenues and profits of the Duke Endowment or that she does not now have or never has had any possession or custody or control over the personal property of said Duke Endowment, or any right to bring or cause to be brought into her possession, custody, or

control the said properties or the evidences thereof. Defendants state that by virtue of the provisions of Item IV of the Last Will and Testament of James B. Duke, dated December 11, 1924 and probated in the Surrogate's office of Somerset Co., N. J., it is provided as follows:

> "I give, devise and bequeath to my said daughter, DORIS DUKE, specifically, absolutely and in fee simple forever, any and all funds and properties of whatever kind, at any time or from time to time held in, forming a part of, or arising under, or hereby devised or bequeathed to, any trust which I hereby create or may have created by indenture prior to my death (including the trust created by me by Indenture dated May 2, 1917, the trust created by me by Indenture dated September 4, 1917, and the trust created by me by Indenture dated December 11, 1924) and/or any of said instruments in whole or in part for the benefit of my said daughter, DORIS DUKE, to the extent that said funds and properties may not be, or shall not have been legally or validly, paid or applied or distributed under or by virtue of the terms of any one or more of said trusts and/or of the instruments creating or establishing the same by reason of any one or more of said trusts and/or said instruments to any extent not completely disposing of said funds and properties or being, or being held, declared, adjudged or decreed to be, void, invalid, illegal, inadequate or ineffectual, in whole or in part, for any reason, on any ground, at any time, to any extent or in any respect whatever.
>
> "I also give, devise and bequeath to my said daughter, DORIS DUKE, specifically, absolutely and in fee simple forever, any and all funds and properties at any time and from time to time held in,

forming a part of, or arising under, or hereby devised or bequeathed to, any trust which I hereby create or may have created prior to my death by Indenture (including the trust created by me by Indenture dated December 11, 1924, wherein the said trust is denominated The Duke Endowment) in whole or in part for the benefit of any charitable purpose to the extent that said funds and properties may not be, or shall not have been legally or validly, paid or applied or distributed under or by virtue of the terms of any one or more of said trusts and/or of the instruments creating or establishing the same by reason of any one or more of said trusts and/or said instruments being, or being held, declared, adjudged or decreed to be, void, invalid, illegal, inadequate or ineffectual in whole or in part for any reason or on any ground at any time, to any extent whatever or in any respect whatever."

Defendants state that by reason of the provisions of said Last Will and Testament, plaintiff has a personal and beneficial interest in and to said trust.

Defendants further deny that the securities and personal property belonging to said Duke Endowment and the evidences thereof have and always have had a legal situs outside of the State of New Jersey, but state that said personal property has had at all times and still has its legal situs in the Township of Hillsborough and State of New Jersey.

Defendants deny that the assessments by the Somerset Board of Taxation for the tax years 1940 and 1941 with respect to intangible personal property of the Duke Endowment was or is an attempt to extend to taxing jurisdiction of the Somerset County Board of Taxation beyond

the territorial limits of said Township, County and State; and defendants deny that said assessments are in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and a denial of the due process of laws secured thereby, or that said assessments are unconstitutional, invalid and void.

Except as herein admitted or denied, defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph 33 and therefore deny same.

34. Defendants admit the allegations contained in paragraph 34, but beg leave to refer to the remaining provisions of the Revised Statutes of the State of New Jersey pertaining to taxation.

35. Defendants admit the allegations contained in paragraph 35.

36. Defendants admit the allegations contained in paragraph 36.

37. Defendants deny the allegations contained in paragraph 37 and state that in and by said resolutions and assessments the Somerset County Board of Taxation is complying with its mandatory duty under the laws and statutes of the State of New Jersey to tax all property within the jurisdiction of its taxing district at its true value.

38. Defendants deny the allegations contained in paragraph 38 and state that in and by said resolutions and assessments the Somerset County Board of Taxation is complying with its mandatory duty under the laws and stat-

utes of the State of New Jersey to tax all property within the jurisdiction of its taxing district at its true value.

39. Defendants admit that the defendant Horner, as such Collector, at the direction of the Somerset County Board of Taxation and in compliance with the mandatory duty imposed upon him by law, is demanding from the plaintiff payment of said taxes by reason of said assessments, but denies the remaining allegations of paragraph 39.

40. Defendants deny the allegations contained in paragraph 40 but state that if said allegations are true they are due to the fact that plaintiff concealed from the Collector of Taxes of the Township of Hillsborough the true amount of her taxable assets in previous years and her existence as a taxpayer of the Township of Hillsborough and State of New Jersey.

41. Defendants deny each and every allegation contained in paragraph 41 and state that all acts alleged to have been performed by the defendants were done pursuant to the mandatory duty imposed by law upon them. Defendants further state that if any discrimination as existed it has been against the remaining taxpayers of the Township of Hillsborough, the County of Somerset and the State of New Jersey, by reason of the fact that the plaintiff, individually and as trustee, has failed to pay any taxes on personal property owned by her for the past seventeen years.

42. Defendants deny the allegations contained in paragraph 42 and state that said allegations are wholly immaterial and irrelevant to the issues here involved.

Answer

43. Defendants deny the allegations contained in paragraph 43.

FIRST SEPARATE DEFENSE

Defendants state that this Court has no jurisdiction over the within cause, for the reason that the said Doris Duke Cromwell is not a citizen or inhabitant of the Territory of Hawaii, as set forth in the complaint, but that she is a citizen and resident of the State of New Jersey, of which State defendants are also citizens.

SECOND SEPARATE DEFENSE

Defendants deny that the matters in controversy in this suit are proper questions arising under the Constitution and Laws of the United States, but aver on the contrary that no proper Federal question arises under the bill of complaint.

THIRD SEPARATE DEFENSE

Defendants state that the controversy alleged to exist between plaintiff and defendants is one solely between the State of New Jersey, in its sovereign capacity through the municipal corporations defendant and the individual defendants acting as agents and agencies of said State, and the plaintiff as a taxpayer of said State; that said controversy is purely local in character and is properly cognizable in the Courts of the State of New Jersey only; and that this Court is wholly without jurisdiction in the premises.

Fourth Separate Defense

Defendants aver and charge that the within action is one to enjoin, suspend, restrain and interfere with the assessment, levy and collection of a tax imposed by and pursuant to the Laws of the State of New Jersey; that a plain, speedy and efficient remedy may be had in the courts of the State of New Jersey and under the laws of said State respecting all the matters herein complained of, alleged and set forth, and all of the relief herein prayed for; that by virtue thereof, under the provisions of Title 28, Section 41, Subdivision 1, of the United States Code Annotated, and within the meaning and intent of said Section, this Court is wholly without jurisdiction over said suit.

Fifth Separate Defense

By the statutes and laws of the State of New Jersey, a plain, adequate and speedy remedy is afforded to the plaintiff for the review of the assessments herein complained of, through the medium of an appeal from said assessments and from the decision and determination of the Somerset County Board of Taxation in making said assessments, to the State Board of Tax Appeals of the State of New Jersey; whose determination, in turn, is reviewable by the Supreme Court of the State of New Jersey and the Court of Errors and Appeals of the State of New Jersey, in the manner provided by the laws and statutes of said State. Defendants charge that plaintiff has not exhausted the remedies provided in the courts of the State of New Jersey, nor has she availed herself of her right to appeal from said assessments, although the time for the filing of said appeal has not yet expired.

Defendants state that the proceedings before the Somerset County Board of Taxation and the Assessments made by said board constitute a proceeding pending in the courts of the State of New Jersey involving the identical issues raised herein and over which issues the courts of said State have full and complete jurisdiction; that by reason thereof this court is without jurisdiction to entertain this action, under the provisions of the Federal Declaratory Judgments Act, nor to grant the relief herein prayed for by the plaintiff.

SIXTH SEPARATE DEFENSE

Defendants state that the controversy alleged to exist between plaintiff and defendants is one solely between the State of New Jersey, in its sovereign capacity, acting through the defendants, as agents and agencies of said State, and the plaintiff as a taxpayer of said State; that the consent of said State to be sued has not been obtained by the plaintiff as a condition precedent to the institution of said action; and that this court is therefore without jurisdiction to try the issues herein involved.

SEVENTH SEPARATE DEFENSE

Plaintiff has failed to join as parties defendant to the bill of complaint William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting the Somerset County Board of Taxation, notwithstanding that said persons and the Somerset County Board of Taxation are necessary parties defendant to this cause of action.

EIGHTH SEPARATE DEFENSE

The bill of complaint herein charges that the assessments made against plaintiff, which form the subject matter of this cause of action, were imposed and assessed against plaintiff by the Somerset County Board of Taxation and were made by and through the resolutions and determinations of said Somerset County Board of Taxation and not by these defendants. Defendants charge that by reason thereof the said Somerset County Board of Taxation and William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting the said Somerset County Board of Taxation, are necessary parties defendant to this cause, and that by reason of plaintiff's failure to include said persons as defendants herein the bill of complaint is, as to these defendants, fatally defective and fails to charge or allege any grounds for relief against these defendants.

NINTH SEPARATE DEFENSE

Plaintiff, without notice to these defendants, voluntarily consented to a dismissal of the bill of complaint as against the defendants, William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting the Somerset County Board of Taxation. Defendants charge that by reason of the allegations of the bill of complaint herein, any claim for relief as against these defendants is barred by reason of the voluntary dismissal of the bill of complaint as to the defendants William Lifgren, W. W. Davenport, Jr., and Angelo R. Soriano, constituting the Somerset County Board of Taxation, and the defendants aver that plaintiff is estopped from seeking any relief as against these defendants.

TENTH SEPARATE DEFENSE

The sole cause of action alleged in the bill of complaint is against the defendants William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting the Somerset County Board of Taxation, and no cause of action is alleged as against these defendants. The said William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting the Somerset County Board of Taxation, were voluntarily dismissed as parties defendant herein, through the consent of the plaintiff and without notice to these defendants. Defendants state that by reason thereof the bill of complaint fails to set forth any cause of action against these defendants, or any grounds for relief against these defendants.

ELEVENTH SEPARATE DEFENSE

The bill of complaint fails to adequately set forth any cause of action, legal or equitable, against these defendants, entitling plaintiff to the relief prayed for under the Federal Declaratory Judgment Act.

OBJECTIONS IN POINT OF LAW

Defendants reserve the right, at or before the trial or hearing of this cause, to move to strike out and dismiss the bill of complaint herein upon the following grounds:

1. That this Court is without jurisdiction over the within cause, for the reason that the plaintiff is not a citizen or inhabitant of the territory of Hawaii, as set forth in the complaint, but is a citizen and resident of the

State of New Jersey, of which State defendants are also citizens.

2. That the matters in controversy, as alleged in the bill of complaint, are not proper questions arising under the constitution and laws of the United States, and that no proper Federal question arises under the bill.

3. That the controversy alleged to exist between plaintiff and defendants is one solely between the State of New Jersey in its sovereign capacity, through the defendants, acting as agents and agencies of said State, and the plaintiff as a taxpayer of said State; that said controversy is purely local in character and is properly cognizable in the courts of the State of New Jersey only; and that this Court is wholly without jurisdiction in the premises.

4. That the within action is one to enjoin, suspend, restrain and interfere with the assessment, levy and collection of a tax imposed by and pursuant to the laws of the State of New Jersey; that a plain, speedy and efficient remedy may be had in the courts of the State of New Jersey and under the laws of said State respecting all of the matters herein complained of and all of the relief herein prayed for; that by virtue thereof, under the provisions of Title 28, Section 41, Subdivision 1, of the United States Code Annotated, and within the meaning and intent of said Section, this Court is wholly without jurisdiction over said suit.

5. That a plain, adequate and speedy remedy is afforded to the plaintiff for the review of the assessments herein complained of, under the statutes and laws of the State of New Jersey and in the courts of the State of

New Jersey, through the medium of an appeal from the determination of the Somerset County Board of Taxation, in making said assessments, to the State Board of Tax Appeals of the State of New Jersey; whose determination, in turn, is reviewable by the Supreme Court of the State of New Jersey and the Court of Errors and Appeals of the State of New Jersey, in the manner provided by the laws and statutes of said State; that plaintiff has not exhausted the remedies provided her in the courts of the State of New Jersey, nor has she availed herself of her right to appeal from said assessments, although the time for the finding of said appeal has not yet expired; that the proceedings before the Somerset County Board of Taxation and the assessments made by said Board, as alleged in the bill of complaint, constitute a proceeding pending in the courts of the State of New Jersey involving the identical issues raised herein, over which issues the courts of the State of New Jersey have full, complete and exclusive jurisdiction; that by reason thereof this court is without jurisdiction to entertain this action or to grant the relief herein prayed for by the plaintiff.

6. That the controversy alleged to exist between plaintiff and defendants is one solely between the State of New Jersey in its sovereign capacity, acting through the defendants as agents and agencies of said State, and the plaintiff as a taxpayer of said State; that the consent of said State to be sued has not been obtained by the plaintiff as a condition precedent to the institution of said action, and that this court is therefore without jurisdiction in the premises.

7. That the courts of the State of New Jersey have sole and exclusive jurisdiction over the within cause of action and that this Court is without jurisdiction in the premises.

8. That no cause of action is alleged, entitling plaintiff to relief under the provisions of the Federal Declaratory Judgment Act.

9. That the plaintiff has failed to join William Lifgren, W. W. Davenport, Jr., and Angelo R. Soriano, constituting the Somerset County Board of Taxation, who are necessary parties defendant to this cause.

10. That the bill of complaint alleges that the assessments made against plaintiff, which form the subject matter of this suit, were imposed and assessed against plaintiff by William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting and acting as the Somerset County Board of Taxation, and were made by and through the resolutions and determinations of said Somerset County Board of Taxation, and not by these defendants. By reason thereof, the said William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting the Somerset County Board of Taxation, are necessary parties defendant to this cause; that plaintiff has failed to include said persons or said Somerset County Board of Taxation as defendants herein, notwithstanding they are necessary parties; and that the bill of complaint for such reasons fails to charge or allege any grounds for relief against these defendants.

11. That the plaintiff, without notice to these defendants, voluntarily consented to a dismissal of the bill of complaint as against the defendants, William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting the Somerset County Board of Taxation; that by reason of such voluntary dismissal, without notice to these defendants, any claim for relief as against these defend-

ants is barred and plaintiff is estopped from claiming the relief prayed for as against these defendants.

12. That the bill of complaint, on its face, allege that all acts performed by these defendants were performed in pursuance of their mandatory duty imposed upon them by law under the direction of the Somerset County Board of Taxation, whose direction defendants were bound to follow.

13. The bill of complaint fails to set forth any cause of action, legal or equitable, against these defendants, entitling plaintiff to the relief prayed for under the Federal Declaratory Judgment Act.

WHEREFORE defendants, Township of Hillsborough, Somerset County, New Jersey; Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, and Charles V. N. Davis, Assessor of the Township of Hillsborough, pray that the bill of complaint exhibited against them herein may be dismissed, and that your defendants may have their costs.

CLARKSON A. CRANMER,
Attorney for Defendants, Township of Hillsborough, Somerset County, New Jersey; Christopher G. Horner, Collector of Taxes of the Township of Hillsborough; and Charles V. N. Davis, Assessor of the Township of Hillsborough.

Post Office Address:
Somerville Trust Co. Bldg.
Somerville, N. J.

COX & WALBURG
KESSLER AND KESSLER
of Counsel

Notice of Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment *Plaintiff* *v.* TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey, *et als.* *Defendants*	Civil Action #1665

To: DORIS DUKE CROMWELL, individually, and
Messrs. PITNEY, HARDIN & SKINNER, her attorneys

SIRS:

TAKE NOTICE that on Monday, November 3, 1941, at ten o'clock in the forenoon or as soon thereafter as counsel may be heard, we shall apply to the Judge sitting to hear motions in the above entitled court, at the Post Office Building, Federal Square, Newark, New Jersey, for an order dismissing the complaint filed in the above entitled matter by said plaintiff on one or more of the following grounds:

1. That no actual controversy exists between the plaintiff and these defendants, cognizable by this Court within the Federal Declaratory Judgment Act, U. S. C. A. 28, section 400.

2. That this Court is without jurisdiction for the reason that no actual controversy exists between this plaintiff and these defendants.

Notice of Motion to Dismiss Complaint

3. That the sole relief prayed for by the plaintiff herein is for a judgment of this Court declaring invalid certain tax assessments levied under the laws of the State of New Jersey, by the Somerset County Board of Taxation, consisting of William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano; that subsequent to the institution of the within action the said plaintiff consented to a discontinuance or dismissal of such action against said Somerset County Board of Taxation, consisting of said William Lifgren, W. W. Davenport, Jr., and Angelo R. Soriano, without notice to these defendants. The said William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting the Somerset County Board of Taxation, are indispensable and necessary parties-defendant to the within action, without which this Court cannot determine the issues raised herein.

4. That the purpose of the within action is to enjoin, suspend or restrain the assessment, levy or collection of a tax imposed by and pursuant to the laws of the State of New Jersey, although a plain, speedy and efficient remedy may be had at law or in equity in the courts of the State of New Jersey, contrary to the provisions of U. S. C. A. 28, section 41, subdivision 1.

5. That this court is without jurisdiction of the within action for the reason that the complaint fails to state a claim within the jurisdiction of this Court.

6. That a plain, speedy, adequate and efficient remedy is afforded to the plaintiff for the review of the assessments complained of under the statute and laws of the State of New Jersey.

7. That the plaintiff herein has failed to exhaust her remedies in the administrative bodies and the courts of the State of New Jersey provided for the review of the assessments complained of.

8. That the assessments complained of was made pursuant to the provisions of the laws of the State of New Jersey, and by the Somerset County Board of Taxation, a state administrative body acting as agent of the State of New Jersey, and that the within action relates to a controversy alleged to exist between the plaintiff and the State of New Jersey in its sovereign capacity, and that the consent of the said State of New Jersey to be sued has not been obtained by the plaintiff, and that this Court is, therefore, without jurisdiction.

Respectfully

CLARKSON A. CRANMER,
Attorney for defendants, Township of Hillsborough, Somerset County, New Jersey; Christopher G. Horner, Collector of Taxes of the Township of Hillsborough; and Charles V. N. Davis, Assessor of the Township of Hillsborough
Post Office Address:
Somerville Trust Co. Bldg.
Somerville, N. J.

KESSLER & KESSLER
COX & WALBURG
Of Counsel
By HARRY E. WALBURG

Opinion of Fake, *D. J.*, Denying Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment, *Plaintiff*; *vs.* TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey; CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough; WILLIAM LIFGREN, W. W. DAVENPORT, JR. and ANGELO R. SORIANO, Somerset County Board of Taxation; and CHARLES V. N. DAVIS, Assessor of the Township of Hillsborough, *Defendants.*	Civil 1665

APPEARANCES:

Messrs. PITNEY, HARDIN & SKINNER, by SHELTON PITNEY, Esq., and WILLIAM J. BRENNAN, JR., Esq., For the Plaintiff.

CLARKSON A. CRANMER, Esq.

Messrs. KESSLER & KESSLER, by SAMUEL I. KESSLER, Esq., and

Messrs. COX & WALBURG, by HARRY E. WALBURG, Esq., For the Defendants.

Opinion of Fake, D. J., Denying Motion to Dismiss Complaint

FAKE, District Judge:

This suit is instituted under the Federal Declaratory Judgment Act, U. S. C. A. 28, Sec. 400. The plaintiff, who sues both as an individual and as a trustee, seeks the judgment of this court as to the validity of certain taxes assessed against her on intangible personal property claimed by the taxing authorities to be situate in the Township of Hillsborough in the County of Somerset and State of New Jersey.

The issues presently to be disposed of arise on a motion to dismiss the complaint, based on a number of specific grounds, which will be hereinafter separately considered.

First: It is contended that no actual justiceable controversy exists between the plaintiff and the defendants, which is cognizable under the Declaratory Judgment Act.

For the purposes of this motion, the Court accepts as true all the allegations of the complaint, which are well and sufficiently pleaded as in cases arising on demurrer at common law. That this is the proper approach is so firmly founded as to require no citations to sustain it.

It appears upon the face of the complaint that the defendant Horner, acting as the Township Collector, and after certain preliminary proceedings, made a demand upon the plaintiff in writing, calling upon her individually to make payment of certain tax bills, covering personal property aggregating the sum of $3,735,385.16 for the years 1940 and 1941. A like demand was made upon the defendant as trustee of the Duke Endowment for an aggregate sum of $10,069,310.06 for personal property taxes for the said years.

Opinion of Fake, D. J., Denying Motion to Dismiss Complaint

Plaintiff alleges that she is not now, and has not been, a resident and inhabitant of the Township of Hillsborough since "prior to October 1, 1940", and that her residence and domicile has been in the Territory of Hawaii, since prior to October first as aforesaid. Moreover, she alleges that the personal property, so assessed, had no situs within the taxing district within the time that it might be legally assessed.

Taxes, legally assessed against personal property in the State of New Jersey, create a personal liability against the individual in whose name the same are assessed. (Revised Statutes of New Jersey, sec. 54:4-1.) It is provided by Sec. 54:4-80 of said statutes that a copy of the entry of a tax so assessed "shall be a sufficient warrant for the distress and sale or arrest and imprisonment authorized by Secs. 54:4-78 and 54:4-79 of this Title." From which it would appear on the fact of the complaint, that the property in question could not be legally assessed within the Township because it was not within the Township, and the plaintiff was a nonresident at the time the assessments were levied. See Dewey v. Des Moines, 173 U. S. 193, 43 L. Ed. 665; American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231, and Nashville C. & St. L. R. v. Wallace, 288 U. S. 249, 77 L. Ed. 730. Therefore, an actual controversy cognizable before this Court does exist between the plaintiff and the defendants.

Second: After the institution of this suit, the defendants Lifgren, Davenport, and Soriano, constituting the Somerset County Board of Taxation, sought an order dismissing the suit as to them, on the ground that they were not necessary parties, and with the consent of plaintiff's attorneys, such an order was entered. The remaining de-

fendants now contend that this order was entered without notice to them, and that the said defendants were necessary parties. This contention can not be sustained because the Board has no interest in this controversy, nor has it any power to collect the taxes involved. No relief is sought against it. Its relation to the issues here is analogous to that of a court whose opinion is being questioned or attacked. Raymond v. Chicago Traction Co., 207 U. S. 30, 52 L. Ed. 78. A reading of the statute under which the assessments were made (R. S. 54:3-20), shows that the Township, and its Collector Horner, were alone vested with power to demand and enforce collection of the taxes, and upon payment the monies would become the funds of the Township. See R. S. 54:4-1; 54:4-64 to 67, 54:4-78 to 80 and R. S. 54:4-73. See also Booth v. Parnell, 12 N. J. Misc. 413, and Greene v. Louisville & I. R. Co., 244 U. S. 499, 508-7, 61 L. Ed. 1281.

Third: It is argued that the purpose of this declaratory judgment proceeding is to suspend or restrain the collection of a tax contrary to the provisions of U. S. C. A. Title 28, sec. 41, subd. 1. At the moment we are concerned only with the relief sought under the complaint, and not with the use or purposes to which the judgment may subsequently be directed. No relief whatever is now sought, other than a judgment on the validity of the assessments complained of; hence, no violation of the section above mentioned is involved because no restraint of any kind is asked for. This Court is, therefore, free to proceed to judgment. Nashville, C. & St. L. R. Co. v. Wallace, 288 U. S. 249, 77 L. Ed. 730, Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 81 L. Ed. 617, Carpenter v. Edmonson, 92 F. (2d) 895, N. Y. Life Ins. Co. v. Roe, 102 F. (2d) 28, Rydstrom v. Massachusetts Accept. Co., 25 F. Supp. 359, Penn-

sylvania v. Glenn, 10 F. Supp. 483, Morrison-Knudsen Co. v. State Board of Equalization, 35 F. Supp. 553, Black v. Little, 8 F. Supp. 867, Fosgate v. Kirkland, 19 F. Supp. 152. Per contra, see Collier Ad. Service v. City of New York, 32 F. Supp. 870, the reasoning of which is destroyed by the reasoning of Judge Kennedy in the Morrison-Knudsen case above cited.

Fourth: It is urged that there is an adequate remedy at law, and therefore, this complaint should be dismissed. It is my view that a justiceable issue is involved here under the Declaratory Judgment Act, and the rule limiting jurisdiction in equity does not apply.

Fifth: It is argued that plaintiff has failed to exhaust her remedies in the administrative bodies and the courts of the State. In this connection, attention is directed to the opinion of Mr. Justice Perskie in Central Co. of New Jersey v. State Tax Department, 112 N. J. L. 5, 169 Atl. 489, from which moving counsel attempts to spell out an intent by the court of last resort of New Jersey to follow the rulings in the federal cases, such as, Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, and Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239.

As I read the opinion of Mr. Justice Perskie above mentioned, I find that it carefully avoids meeting the rule laid down in the federal cases above cited, and merely holds there was no discrimination in fact. This is a long way from holding that if discrimination was shown as a fact, the federal case law as to discrimination would prevail. That it was not the intent to follow the federal case law, clearly appears by an opinion of Mr. Justice Perskie, sitting later in the New Jersey Supreme Court in Lehigh

Valley R. R. v. State Board, 12 N. J. Misc. 673, wherein he said:

> "Did the state board commit an error in law in refusing to hear the testimony of petitioners touching discrimination? Decidedly no. It is the established law of this state that the fact that other property in a taxing district is assessed for valuation less than its true value affords no ground for reducing the assessment placed upon the property of a complaining taxpayer below the true value thereof. Royal Manufacturing Co. v. Board of Equalization of Taxes, 78 N. J. L. 337; 74 Atl. Rep. 525. The petitioners concede this to be true but contend that the rule to the contrary, as announced in the cases of which Sioux City Bridge Co. v. Dakota, 260 U. S. 441, is typical, should be followed and that the holding of Royal Manufacturing Co. v. Board of Equalization of Taxes, supra, should be disapproved. A substantially like contention was made and denied by this court in the case of Hackensack Water Co. v. Woodcliffe Lake, 104 N. J. L. 48; 139 Atl. Rep. 410. The law, on this point, is also settled and controlling."

Thus it is found that Judge Buffington's opinion in Central R. Co. of New Jersey v. Martin, 65 F. (2d) 613 still stands unblighted by the strictures found In re New York, S. & W. R. Co., 36 F. Supp. 158, and the law of the State of New Jersey still remains in conflict with the Constitution of the United States. It follows that the administrative remedies provided by the State, and sustained by the state courts, fail to afford a full, complete and adequate remedy to redress the discrimination charged in the complaint under review.

Order Denying Motion to Dismiss Complaint

All of the objections raised to the complaint on this motion are completely set at naught by the cases relied upon in the plaintiff's answering brief.

The motion to dismiss is denied, and an order will be entered accordingly.

Order Denying Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, Individually and as Trustee of Duke Endowment, *Plaintiff,* *vs.* TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey, *et al.*, *Defendants.*	Civil Action No. 1665

The defendants, Township of Hillsborough, Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, and Charles V. N. Davis, Assessor of the Township of Hillsborough, by their attorneys, having moved to dismiss the complaint in the above entitled cause, and this Court having heard and considered the oral arguments of Harry E. Walburg, Esq., of counsel for the defendants, in support of the motion and of Shelton Pitney, Esq., of counsel for the plaintiff, in opposition thereto, and having read and considered the briefs filed in behalf of the

Order Denying Motion to Dismiss Complaint

respective parties; and the Court being of opinion that said motion to dismiss should be denied and having filed its written opinion in the cause:

It is, on this 10th day of August, 1942, on motion of Pitney, Hardin & Ward (formerly Pitney, Hardin & Skinner), attorneys for the plaintiff, ORDERED that the motion made on behalf of the defendants to dismiss the complaint in the above entitled cause be and the same is hereby denied, with costs.

GUY L. FAKE
U. S. D. J.

Plaintiff's Notice of Motion for Summary Judgment

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, individually and as Trustee of The Duke Endowment, *Plaintiff,* *vs.* TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey, CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough, and CHARLES V. N. DAVIS, Assessor of the Township of Hillsborough, *Defendants.*	Civil Action No. 1665

To: Samuel I. Kessler, Esq.,
Messrs. Kessler & Kessler,
9 Clinton Street, Newark, N. J.

Harry E. Walburg, Esq.,
Messrs. Cox & Walburg,
Raymond-Commerce Bldg., Newark, N. J.

Gentlemen:

PLEASE TAKE NOTICE that on Monday, the 27th day of March, 1944, at 10:30 A. M. (E. W. T.) or as soon thereafter as counsel can be heard, at the court rooms of the United States District Court, District of New Jersey, Post Office Building, Federal Square, Newark, N. J., we shall

apply to the Court for the entry of a summary judgment in the above-entitled action declaring and adjudicating the four certain resolutions adopted by the Somerset County Board of Taxation at an *ex parte* meeting of said Board held on June 26, 1941, as well as all entries and assessments of properties made and tax bills presented in and for said Township of Hillsborough by reason of said resolutions, wholly null and void on the ground alleged in the complaint in said action, and especially in paragraphs 17 and 21 through 32 of said complaint, which sets forth true copies of said resolutions, said tax bills which were dated June 30, 1941, and the letters of said Horner, as Collector of said Township, dated June 30, 1941 which presented said tax bills for "forthwith" payment, namely: That said resolutions were adopted after April first of each of the tax years 1940 and 1941 upon and in response to the written complaints (in said resolutions called "applications") of said Christopher G. Horner, the Collector and a resident and taxpayer of said Township, so demanding and presented to said Board for that purpose and by said resolutions said Board undertook at an *ex parte* meeting of said Board to assess, and to enter or cause to be entered on the tax lists and duplicates of said Township for assessment, in and by said Township for each of said tax years the intangible personal properties embraced in said resolutions, entries and assessments on the ground that said properties had been wholly omitted in the assessment for said Township for each of said tax years, without the plaintiff, either personally or as such Trustee, being given any notice of said complaints or meeting or being present or represented or accorded any hearing at said meeting and in particular without plaintiff in either of said capacities having been given the "five days' notice in writing to the owner by the party complaining" or accorded by said Board the "due

examination" or the "hearing" of a judicial character made indispensable prerequisites to the adoption of such resolutions and the mandatory provision of Section 54:3-20 of the Revised Statutes of New Jersey that:

> "On the written complaint of the collector or any taxpayer of the taxing district or of the governing body thereof that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing, a transcript whereof shall be furnished by the board to the collector who shall amend his duplicate accordingly."

TAKE FURTHER NOTICE that the plaintiff on this motion will rely on the affidavit of Shelton Pitney, Esq., hereto annexed, and on the entire record in this cause.

TAKE FURTHER NOTICE that the plaintiff will apply at the same time and place for an order or a provision in the judgment to be entered that her costs in this action be taxed and ordered to be paid by the defendants.

Respectfully,

PITNEY, HARDIN & WARD
Pitney, Hardin & Ward,
Attorneys for Plaintiff.

March 14, 1944.

Affidavit of Shelton Pitney, Read in Support of Plaintiff's Motion for Summary Judgment

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, individually and as Trustee of The Duke Endowment, *Plaintiff,* *vs.* TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey, CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough, and CHARLES V. N. DAVIS, Assessor of the Township of Hillsborough, *Defendants.*	Civil Action No. 1665

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

SHELTON PITNEY, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I reside in Harding Township, in the County of Morris, State of New Jersey, am an Attorney and Counsellor at law of New Jersey and a partner of Pitney, Hardin & Ward (formerly Pitney, Hardin & Skinner), 744 Broad Street, Newark, 2, New Jersey. From the inception of the above-entitled action said firm has been counsel for the plaintiff therein and I have been the member of the firm in active charge of the action, so I am thoroughly familiar with its facts, pleadings and proceedings.

Affidavit of Shelton Pitney, Read in Support of Plaintiff's Motion for Summary Judgment

2. The Somerset County Board of Taxation at an *ex parte* meeting held on June 26, 1941, and therefore after April first of each of the taxing years 1940 and 1941, adopted four certain resolutions whereby certain intangible personal property, on the alleged ground that said property had been wholly omitted in the assessment for said Hillsborough Township for each of said taxing years, was "assessed" and "ordered" to be entered on the tax duplicate of Hillsborough Township for assessment in said Township as follows: $60,054,424 in value thereof against plaintiff personally and $161,886,014 in value thereof against plaintiff as such Trustee for each of said taxing years; and each of said resolutions ordered that a copy of it be furnished the Collector of said Township "with direction that he enter upon the tax duplicate of said Township the said amount hereby assessed".

3. Said resolutions were adopted by said Board upon and in response to four certain written complaints of said Christopher G. Horner as the Collector and a resident and taxpayer of said Township presented to said Board at an *ex parte* special meeting of said Board held for the purpose on June 16, 1941 and further considered by said Board at an *ex parte* special meeting held for the purpose on June 17, 1941. Attached to said complaints as a part thereof were the affidavits of one James E. Muilaney. Said complaints demanded said action by said Board.

4. No notice whatever of said meetings or of said complaints or their consideration by said Board was given to plaintiff; nor was she present or represented or accorded any hearing at said meetings; and said resolutions were adopted by said Board without the "five days' notice in writing to the owner by the party complaining", the "due

examination" and the "hearing" made indispensable prerequisites in such cases to such action by said Board by the mandatory provision of Sec. 54:3-20 of the New Jersey Revised Statutes that:

> "On the written complaint of the collector or any taxpayer of the taxing district or of the governing body thereof that property specified has been omitted in the assessment the county board, on five days' notice in writing to the owner by the party complaining and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing, a transcript whereof shall be furnished by the board to the collector who shall amend his duplicate accordingly."

5. Each of said resolutions directed that there be given to plaintiff by registered mail "immediate notice of the entry of this assessment", a copy of the resolution certified by the Secretary of the Board and "a notice of the time and place of the next regular meeting of this Board to be held at 10:30 A. M. D. S. T. on Monday, July 14, 1941, at Somerset County Court House, Somerville, N. J." This was done as directed and constituted the only notice to plaintiff of said complaints, of said meetings and of said action of said Board.

6. On June 30, 1941, said Horner as Collector of said Township wrote letters to plaintiff enclosing bills for the taxes claimed to be due said Township by reason of said action of said Board, namely, by plaintiff personally $1,873,608.02 for the taxing year 1940 and $1,861,687.14 for the taxing year 1941, and by plaintiff as such Trustee $5,-

Affidavit of Shelton Pitney, Read in Support of Plaintiff's Motion for Summary Judgment

050,843.63 for the taxing year 1940 and $5,018,466.43 for the taxing year 1941. These bills were dated June 30, 1941, and as to them the letters said:

> "Please take notice that interest and penalty at the rate of 6% per annum are running from the date of this bill."
>
> "Please take further notice that this letter is a formal demand for payment of the within bill forthwith and unless payment is received accordingly I will be obliged to proceed according to law."

7. These paragraphs of these letters referred not only to Secs. 54:4-64 to 73 of the New Jersey Revised Statutes authorizing collectors to collect taxes with interest and penalties but also to the following sections thereof:

> Sec. 54:4-1, providing that any person "assessed for personal property shall be personally liable for the taxes thereon".
>
> Sec. 54:4-78, authorizing collectors to collect such taxes "by distress and sale of any goods and chattels" of the person liable.
>
> Sec. 54:4-79, providing that "the collector may in person or by deputy" arrest and imprison until payment the person liable for such taxes.
>
> Sec. 54:4-80, providing that a copy of the tax entry certified by the collector to be truly taken from his duplicate "shall be sufficient warrant for the distress and sale or arrest and imprisonment authorized by" said Sections 54:4-78 and 54:4-79.

8. The complaint in this action was filed in this court and served on the defendants on July 14, 1941. It set forth,

among other things, the adoption of said resolutions on the said complaints of said Horner by said Board at its *ex parte* meeting on June 26, 1941 and said presentation for payment of said tax bills by said collector, together with true copies of said resolutions, tax bills and letters. It averred that by said action said Board had undertaken after April first of each of the taxing years 1940 and 1941 to assess and enter for assessment for each of said taxing years in said Township intangible personal property on the alleged ground that said property had been wholly omitted in the assessment for said Township for each of said taxing years. It alleged that said Board had adopted said resolutions without plaintiff having been given any notice or hearing whatever and without any compliance with said provision of said Sec. 54:3-20, which it quoted. And it charged that by reason of said facts the said action of said Board, the resolutions thereby adopted, and all the entries and assessments of properties made and tax bills presented by reason of said action and resolutions were in violation of the laws of New Jersey and wholly null and void and should be so declared and adjudged by this Court for lack of jurisdiction and authority in said Board so to act. See especially paragraphs 17 and 21 through 32 of the complaint.

9. The answer of the defendants alleged that in adopting said resolutions said Board had acted in conformity to the provisions of said Section 54:3-20 that:

> "The county board of taxation shall by resolution cause to be entered upon the tax duplicate a proper assessment against any property omitted by the assessor. The board shall then give immediate notice of such entry and of the time and place of its

next meeting to the owner of the property affected and furnish a copy of the entry to the clerk or collector of the taxing district who shall enter it on his tax list."

which it claimed conferred full authority upon such Board for such action, and denied that plaintiff had not been accorded the notice and hearing required by the laws of New Jersey. See paragraphs 17, 23, 28 and 29 of the answer.

10. The questions of fact with respect to said action of said Board have now been settled by the testimony of its members, to wit, William Lifgren, its President, W. W. Davenport, Jr., its Vice President, and Angelo R. Soriano, in their depositions duly taken and filed in this Court in this action on behalf of the plaintiff, which depositions are by reference made a part of this affidavit as if herein set forth at length.

By this testimony it is established that said written complaints of said Horner, as such Collector, resident and taxpayer, with the affidavits of one James E. Mullaney forming a part thereof, were presented to an *ex parte* meeting of said Board specially called for the purpose at the request of Clarkson A. Cranmer, the attorney for said Township, who, with Alfred L. Kirby, the agent of said Township for securing and collecting said assessments, appeared and insisted that said Board act on said complaints solely on said complaints and the claimed authority of the provisions of Section 54:3-20 quoted in paragraph 9 hereof and without plaintiff being accorded any notice of hearing and without any compliance with the provision of said section quoted in paragraph 4 hereof, and that said Board, after considering

said provisions of said section at other *ex parte* meetings of said Board, did at its *ex parte* meeting on June 26, 1941, adopt said resolutions as insisted by said Cranmer and Kirby solely upon the statements made in said complaints, without plaintiff being accorded any notice or hearing, without any other proof, inquiry, investigation or examination and without any compliance with the provision of said section quoted in paragraph 4 hereof.

Thus said Lifgren testified that:

Mr. Cranmer called him on the phone and asked him "to call a special meeting of the Board to consider something of importance that would be brought up at our meeting" (pp. 315-6). The meeting was held June 16, 1941, with Messrs. Lifgren and Soriano and the Secretary of the Board and Messrs. Cranmer and Kirby present (pp. 317-8). Mr. Cranmer presented the said complaints of Horner (which in said deposition are referred to as P-10, P-11, P-12 and P-13 for Identification) and that was the first knowledge the members of the Board had of them (pp. 315-6). Mr. Kirby "urged" that "no hearing was necessary by reason of the provision of some section of the law" (p. 321) and either Kirby or Mr. Cranmer talked "of Hillsborough mandamusing us before the Supreme Court to make us put it on if we did not put it on" (pp. 323-4), said "that is what could be done if we did not do it" (p. 324). Because of the absence of Mr. Davenport the meeting was adjourned without other action to June 17, 1941 (pp. 318-9).

At the meeting on June 17, 1941, there were present the three members and the Secretary of the

Board, "there was discussion of the question of a hearing" and "the Board discussed both of these paragraphs very thoroughly. We decided that it was all over our heads. We dumped it into the lap of the Attorney General for his final summation" (pp. 320-2).

On the afternoon of June 17, 1941, Mr. Lifgren, Mr. Davenport and the Secretary of the Board went to Trenton to see the Attorney General and there they talked to Mr. John Solan, Assistant Attorney General, who told us to leave the papers there, that he would look them over and let us know at a later date" (pp. 321-2).

On June 24, 1941, the three members and the Secretary of the Board saw Mr. Solan again in the State House in Trenton, wanting to know "what we are going to do with these four complaints"; they discussed with him "the advisability of having a hearing as you had had in the Duke Power case after the complaint was filed" and "these two specific paragraphs was brought up as was the day Mr. Cranmer appeared here and Solan agreed with the Township Attorney that these paragraphs both contradicted one another, either one would answer the purpose" (pp. 323-4).

"So we left there with just as much knowledge as to what to do as we had when we went there" (p. 323). "We went out in the park there. We sat on the bench because Commissioner Davenport had to leave us, go on his way in his business. We sat on the bench, Commissioner Davenport, Soriano, the Secretary and myself sat on the bench; we decided

right there and then we would put it on" (pp. 325-6). We "finally concluded at that time that at the next meeting of the Board we would put them on" p. 326).

This next meeting was held on June 26, 1941, with the three members and the Secretary of the Board, Messrs. Cranmer and Kirby, Mr. Grover Kipsey for the Board of Freeholders, and two newspaper reporters present; there was no discussion of the assessments; "Mr. Cranmer presented the forms of resolutions already prepared" and as he read them to the meeting they were adopted by the Board; and so the Board acted (pp. 327-8).

"In making the assessments involved in this case", the Board acted under the first two sentences of Sec. 54:3-20 "to omit the hearings" and did not purport to act under "the sentences following the two sentences which you have read into the record", "because we didn't give any hearing" (pp. 338-41). "The action taken on November 22nd", on which day the "Board adopted resolutions fixing an assessment against Duke Power Company of $21,953,000" was "taken on the authority of those two sentences", referring to "the first two sentences of 54:3-20" (pp. 345-6).

"The Board relied on those complaints in making its resolutions" adopted June 26, 1941, and "accepted the statements of facts in Mr. Mullaney's affidavit as accurate" and "that was also true of the statements of facts in Mr. Horner's affidavits" (p. 346). "The Board's inquiry and examination into the facts were limited to a consideration of the ap-

plication of Mr. Horner and Schedule A and the affidavit of Mr. Mullaney annexed thereto, and no persons were called or examined or sworn at all, or any record taken" and "Horner wasn't there" and "Mullaney wasn't there" and "Kirby wasn't examined under oath" (pp. 365-6).

On cross examination by Mr. Cranmer, Attorney for the Township, Lifgren reiterated: "Mr. Kirby on June 16th urged that there be no hearing in this matter" and urged the Board that "there was a couple of paragraphs there, one where a hearing was —you could give them a hearing that would drag this thing out; then by this other paragraph you could get away without the hearing and put the assessment on" (p. 370).

Mr. Davenport testified that:

"In voting for the resolutions on June 26, 1941, he relied for his 'facts entirely upon P-10, P-11, P-12 and P-13', the said Horner complaints; and that when these resolutions recited that said complaints (called 'applications' therein) were 'supported by proof' and that said Board was acting 'after careful consideration of the application and proof and after due inquiry and examination into this matter' these recitals referred only to said applications and their examination and there was no other proof, inquiry or examination whatever (pp. 610, 614-5).

Mr. Soriano testified exactly as did Mr. Davenport (pp. 603-5).

(The figures in the foregoing refer to pages of the depositions.)"

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11. The question of law with respect to the meaning, application and effect of said provisions of Sec. 54:3-20 has now been settled in accordance with the claim of plaintiff in her complaint and contrary to the claim of the defendants in their answer in the like case of *Duke Power Company* v. *State Board*, 129 N. J. L. 449 (Sup. 1943) which annulled identical action by said County Board for non-compliance with the provision of said Section 54:3-20 on which plaintiff relies in this action and on March 9, 1944 the Court of Errors and Appeals unanimously affirmed the judgment in said case "on the opinions below".

My firm, Pitney, Hardin & Ward (formerly Pitney, Hardin & Skinner) was counsel for the Duke Power Company from the inception of said litigation and I have been throughout the member of said firm in active charge of the litigation, so that I am entirely familiar with the facts, pleadings, issues, proceedings and decision.

On August 16, 1939, said Township of Hillsborough, acting by its Collector, said Horner, filed with said Somerset County Board of Taxation its written complaint, of which it gave the Power Company the required "five days' notice in writing". Therein it alleged that some cash and other intangible personal property belonging to said Power Company on October 1, 1938, had been wholly omitted in the assessment for said Township for the taxing year 1939 and demanded that said Board enter said property for assessment for said taxing year by said Township. On motion of the Power Company the Board struck from said complaint for insufficient description all the property items except cash. The Township neither sought a review of this action nor filed a new or amended complaint. The Board heard the cash item on November 13, 1940, and on November 18, 1940, adopted a resolution whereby it

entered for assessment by said Township for the taxing year 1939 cash in the amount of $8,143,159 which it found had been owned by the Power Company on October 1, 1938, and wholly omitted in the assessment for said Township for said taxing year 1939.

Just four days later, on November 22, 1940, without according the Power Company any notice or hearing whatever and without any compliance with said provision of Section 54:3-20, on which plaintiff relies in this action, said Board held "a regularly called meeting" at which there was presented and read the written complaint (called an "affidavit") of said Horner, the Collector of said Township, and with it an affidavit of said James E. Mullaney, wherein said Horner as a taxpayer of said Township alleged that said Power Company on October 1, 1938, had owned intangible person property of the total value of $21,953,125, of which the whole had been omitted in the assessment for said Township for the taxing year 1939 and only the said cash had been entered for assessment by said Board for said taxing year; and said complaint demanded that said Board enter the residue of said omitted property for assessment by said Township for said taxing year 1939.

Immediately upon the reading of said complaint said Board at its meeting on November 22, 1940, and so after April first of the tax year 1939, adopted a resolution whereby said Board (1) "resolved that there be entered upon the tax lists and duplicates for Hillsborough Township for the taxing year 1939 a total assessment of $21,953,124.00 * * * thus amending an assessment determined by this Board on November 18th, 1940, against Duke Power Company, a New Jersey Corporation, covering omitted

'cash' only, which total amount represents the true value of intangible personal property wholly omitted by the local assessor for Hillsborough Township, Somerset County, New Jersey, on the assessing date, October 1st, 1938" and (2) directed that a copy of said resolution, duly certified, be given the Collector of said Township and that the Power Company be given a like copy with immediate notice of the entry of said amended assessment and of the time and place of the next meeting of said Board on Monday, December 2, 1940, which was accordingly done.

Thus we see, as the fact is and as said Lifgren testified, that said Board in adopting the four resolutions on June 26, 1941 relied on the very same sentences of said Section 54:3-20 and followed the very same procedure it had relied upon and followed, and at the insistence of the very same people, in adopting the resolution on November 22, 1940, in the Power Company case, and that said resolutions were in each case adopted for the same purpose, namely, to enter for assessment after April first of the tax year involved property alleged to have been omitted in the assessment for said tax year and so in this respect the Power Company case presented the same legal question presented in this action, namely, the true meaning, application and effect of said Section 54:3-20 in such a case.

On this question the Supreme Court in its opinion by Mr. Justice Bodine thus said and held in the Power Company case:

> "N. J. S. A. 54:3-20 provides a method for the inclusion of property omitted by the assessor and another method for the inclusion of property omitted from the assessment. Let us glance first at the procedure when property is omitted from the assess-

ment. 'On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on *five days'* notice in writing to the owner by the party complaining, and after *due examination and hearing*, may enter the omitted property on the duplicate *by judgment rendered within ten days after the hearing. * * * Such proceeding may be brought within one year from the date when taxes on real property become a lien'*. The italics supplied.''

''The defendants contend that their proceeding were proper because it was under the first part of N. J. S. A. 54:3-20 which reads as follows: 'The county board of taxation shall, by resolution, cause to be entered upon the tax duplicate a proper assessment against any property *omitted by the assessor*. The Board shall then give immediate notice of such entry and of the time and place of its next meeting to the owner of the property affected, and furnish a copy of the entry to the clerk of collector of the taxing district, who shall enter it on his tax list'.''

''There is a vast difference between the inclusion of property omitted by the assessor and property omitted from the assessment.''

''N. J. S. A. 54:4-55 provides: 'The county board shall, on or before April first in each year, cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes assessed, to be delivered to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record.'

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This limits action with respect to property omitted by the assessor to April 1, 1939."

"The assessment was made on the complaint of an aggrieved taxpayer, and the procedural direction of the statute required a specific notice to the owner of the precise property claimed to be omitted from the assessment and a hearing upon notice and a deliberate judgment."

"The underlying question in the case is the proper construction of the statute N. J. S. A. 54:3-20 and a determination as to whether there is a difference in the phraseology 'property omitted by the assessor' and 'property omitted in the assessment'. Both phrases have occurred in our statutes since P. L. 1848, p. 230, was enacted. The first statute had two paragraphs. They were combined in substantially the present form in the revision of 1903. If property in a taxing district is omitted by the assessor it must be added to the assessment before April 1st. Its addition decreases the amount of taxes to be raised since the ratables are thereby increased. The taxpayer is not embarrassed. He knows he will have a tax to pay and is liable anyway even if the property was not included in the assessment. However, if the property is added to the assessment after the rate has been fixed it gives rise to a municipal windfall. There is no harm in this if there were due notice and a fair hearing by the county board and a judicial determination by it. The procedure adopted in this case was not in accordance with the statute. Property omitted by the assessor must be added before April 1st, so that the

rate of taxation may be determined. Thereafter, the addition of property omitted from the assessment must be in accordance with the part of the statute first quoted. *Mitsch* v. *Riverside*, 86 N. J. L. 603; *Shillingsburg* v. *Greenwich*, 83 Id. 129."

"Since none of the property in question was liable to taxation in Hillsborough Township we need not consider the application of the remedial statutes N. J. S. A. 54:4-58 to 54:4-60. However, the remedial statutes we do not find to have been a substitute for proper assessment. Their application has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner. *Musconetcong Iron Works* v. *Borough of Netcong*, 90 N. J. L. 58; *Manistee Iron Works* v. *Raritan*, 12 N. J. Misc. 143. But they do not apply where the statute for the addition of property omitted from the assessment is not complied with. *Mitsch* v. *Riverside*, 56 N. J. L. 603; *Shillingsburg* v. *Greenwich*, 83 Id. 129."

These extracts from the opinion of the Supreme Court in the *Duke Power* case correctly portray that decision on the meaning, application and effect of said Section 54:3-20 and the remedial statutes in cases like that involved therein and in this action and constitute the opinion on these subjects adopted by the Court of Errors and Appeals by its affirmance "on the opinion below".

12. In the Power Company case I, together with Mr. William J. Brennan, Jr., who was then my partner, appeared before said Board on December 2, 1940, in response to said notice that the next meeting of the Board would be

held on that date; and we were refused a hearing, the Board informing us through its President that:

> "We feel that the case is closed so far as we are concerned. * * * We didn't ask you to be here. We simply notified you that we would have our regular meeting today and the reason for that was that if desired to examine the records of that meeting (of November 22, 1940) it was your privilege to do it.
>
> "Mr. Brennan: That was the sole purpose?
>
> "President Belli: That is the sole purpose, nothing else."

Recognizing that in this action said Board was proceeding in the adoption of said resolutions on June 26, 1941, just as it had proceeded in the Power Company case in adopting the resolution on November 22, 1940, and having this abundantly confirmed by said letters of said Collector dated June 30, 1941 presenting said tax bills for payment "forthwith," notwithstanding the notice that the next meeting of the Board would be on July 14, 1941, no appearance was made by or for the plaintiff on July 14, 1941, and by paragraph 26 of the complaint in this action it was alleged that

> "although the letters from said Secretary enclosing certified copies of the said resolutions stated that the next regular meeting of said Somerset County Board of Taxation would be held in Somerville, New Jersey, on July 14th, 1941, said Somerset County Board of Taxation intended and considered said resolutions, and each of them, as constituting final determinations and assessments, and said Board by said letters or otherwise did not intend to suspend the collection of the taxes that might be owing in

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respect of said assessments or to afford plaintiff any opportunity to be heard before said assessments became final."

Complete confirmation of this allegation and of the aforesaid procedure by and attitude of said Board has now been given by Mr. Lifgren in his said deposition, wherein he testified:

"Q. Where there any appearances there (July 14, 1941)? A. No, there wasn't, other than the United States Marshal who served us with the summons" (p. 371).

"Q. Did the members of the Board consider that the adoption of the Resolutions (on June 26, 1941) was the last step it had to do in the matter? A. I thought so.

Q. There was no occasion after you had adopted the Resolutions to hear or consider anything else that might be suggested or raised? A. As I said before, we were led to believe by the paragraphs which appeared to me to contradict one another that this suit was started this way to eliminate a hearing" (p. 330).

"Q. Do you recall the Board's action on a similar affidavit of Mr. Horner in the Duke Power Company case when on November 22nd you added an assessment against the Duke Power Company of $21,953,125? A. Yes, sir.

Q. Do you remember that in these minutes provision was made for a meeting to be held on December 2, 1940? A. Yes, sir.

Q. That is the same kind of a notice which was contemplated in your minutes of June 26th for a meeting on July 14th, isn't it? A. Yes" (341).

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"Q. The action that you took on the 26th of June in this case is identical with the action that you took on November 22nd in the Duke Power case? A. Yes, that is right."

"The procedure in both cases was the same" (p. 376) and had the plaintiff herein or her representatives "come to your meeting of July 14th, as I understand your testimony, we would have had the same hearing on July 14th that had been given us on December 2nd" (p. 380), at which meeting "President Belli stated that the notice of the meeting had been sent to Duke Power Company to give them an opportunity, if so desired, to come in and examine the records pertaining to the Board's decision in the case" and the attorneys and officers of the Duke Power Company appearing at the meeting of December 2, 1940, were told by said President Belli that the case was closed so far as the Board was concerned (pp. 379-80).

Q. When you gave the Duke Power Company notice of a meeting of December 2nd, a representative of the Power Company appeared on December 2nd, the Board stated that there was nothing further that could be done with respect to the Resolutions, that the Board could not change them, that the Board would not take any evidence, that the Board would not swear a stenographer, that the Board would not take any exhibits, isn't that correct? A. Yes, that is it." (p. 335).

Q. "The Board considered, when it adopted its Resolutions of June 26th that it had done everything that it could do in the matter of these assessments? A. That is right" (p. 335).

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13. In addition, it is the law of New Jersey, established by many decisions of the courts of said State, that where notice or examination or hearing its required in advance of a judgment making or increasing an assessment, as does the said provision of Section 54:3-20 of which plaintiff relies, such a judgment is not validated by giving a subsequent notice for a subsequent hearing. See: *Jersey City* v. *Board of Equalization*, 74 N. J. L. 753 (E. & A. 1907); *Hoboken L. & I. Co.* v. *Anderson*, 39 N. J. L. 82 (Sup. 1875); *Bergen R. R. Co.* v. *State Board*, 98 N. J. Eq. 858 (E. & A. 1923); *State* v. *Newark*, 25 N. J. L. 399 (Sup. 1856); *State* v. *Jersey City*, 24 N. J. L. 662 (Sup. 1855). So that plaintiff's non-appearance on July 14 1941, did not prevent the resolutions adopted by said Board on June 26, 1941, from being wholly null and void for failure to conform to the provision of Section 54:3-20 requiring notice and hearing prior to any board action. This is what the Supreme Court held when it said in its opinion in the *Duke Power* case,

> "Property omitted by the assessor *must* be added before April 1st, so that the rate of taxation may be determined. Thereafter the addition of property omitted from the assessment *must* be in accordance with the part of the statute first quoted (which is the part of Section 54:3-20 on which plaintiff relies). *Mitsch* v. *Riverside*, 86 N. J. L. 603; *Shillingsburg* v. *Greenwich*, 63 Id. 129." (Italics supplied.)

14 The aforesaid decisions of the Courts of New Jersey establish the law of said State and the meaning, application and effect of said provision of said Section 54:3-20 in this action, and as such they are binding and controlling on this Court in the above entitled cause and require this Court in this action to hold and by its judgment to declare

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that the said resolutions, assessments and taxes are wholly null and void because in violation of the laws of said State and particularly of the provision of said Section 54:3-20 on which plaintiff relies.

15. The complaint in this action also alleges with particularity that said resolutions, assessments and taxes were wholly null and void and should be so held and declared by the judgment of this Court in said cause because they were in violation of the due process and equal protection clauses of the Constitution of the United States, and there was no adequate remedy therefor under the laws of New Jersey, in that thereby plaintiff personally and as such Trustee has been and is being singled out with deliberate intent to impose on her in each of such capacities an enormous, fraudulent, illegal and discriminatory burden of taxation through taxing her in each of such capacities for each of said tax years upon and with respect to intangible personal property, whereas the taxing authorities in said Hillsborough Township and throughout said Somerset County have consistently, continuously, systematically, notoriously and intentionally for years, including both of said tax years, entirely failed to assess such property for taxation or to impose taxes by reason of ownership or custody of such property, whether personally or as a fiduciary.

16. Since the filing and serving of said complaint plaintiff has caused to be taken and filed in this cause in advance of trial the depositions of said Christopher G. Horner, the Collector of said Township, of said Charles V. N. Davis, the Assessor of said Township, of said William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, the members

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who constituted the said County Board when it adopted said resolutions, of Edward Lindstrom and J. Irvine Stryker, the majority members of the Township Committee of said Township, of Everest L. Belli, a former member and president of said County Board, of assessors of every taxing district in said Somerset County and of two former assessors of such a taxing district. These depositions are hereby by reference made a part of this affidavit as if set forth herein at length.

All these witnesses testified that the assessments of intangible personal property made against plaintiff, personally and as such Trustee, in this action were the first such assessments of such property to their knowledge in said Somerset County or in any taxing Township or District thereof. Thus said Horner testified that he had been the Collector of said Township since 1910 and that "we have never had any intangibles assessed to my knowledge"; said Davis testified that he had been Assessor for five or six years, which included said two tax years, and that there had not been "assessed any intangible personal property, that is bonds or stocks, cash, bank accounts or accounts receivable or mortgages on foreign real estate owned by any of the taxpayers" who were inhabitants of said Township; said Lindstrom testified of the assessments involved in this cause: "This is the first time it had ever been brought out in Hillsborough to tax anybody on stocks, bonds or bank accounts or other intangibles"; said Lifgren testified: "I believe this is the first time it has ever been brought out that such a tax has been put onto anyone"; said Soriano testified that the assessments involved in this cause "stand out alone as an assessment against intangible property in the county"; and said Davenport testified that

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"all personal property assessments are assessments as the assessors in the county have testified against tangible property".

17. Said complaint also alleged, and plaintiff testified under oath in a pretrial deposition taken January 20, 1942, in behalf of the defendants and duly filed in this Court in this action (which said deposition by reference is hereby made a part of this affidavit as if herein set forth at length), that prior to October 1, 1940, plaintiff in good faith and intentionally had become, continued and still was a domiciliary and citizen of the Territory of Hawaii, that she had never held or had in her custody or under her control any of the property of said The Duke Endowment as a Trustee thereof or otherwise, and that all of her intangible personal property had been located out of New Jersey and since prior to October 1, 1940 had had no situs in said State, and alleged that on said account said resolutions and assessments were in violation of the due process clause of the Constitution of the United States and wholly null and void because they were attempts to tax property situated outside of New Jersey and in so doing to impose personal liabilities upon a non-resident of said State.

18. The depositions hereinbefore mentioned and by reference made a part of this affidavit, together with the depositions of said Alfred L. Kirby, said James E. Mullaney and one J. Glenn Anderson, likewise taken and filed in this Court in this action and now made by reference a part of this affidavit as if set forth herein at length, informed plaintiff for the first time, after the filing of her complaint, that said action of said Board on June 26, 1941 had been secured by intentional, malicious fraud, on which account said Lif-

gren testified in his said deposition that had said Board known the real facts it would not have adopted the resolutions and made the assessments (Dep. pp. 325, 347-66, 374-5, 385). This caused plaintiff to move this Court for leave to file an amended and supplemental complaint settling up said fraud and by reason thereof asking that said resolutions and assessments be set aside and annulled and plaintiff recover from those who perpetrated said fraud the damages their wrongful conduct had occasioned her together with punitive damages. In an opinion filed on January 7, 1944 this Court granted said motion to file said amended and supplemental complaint, subject to motion to strike, but no order has been entered for such filing and no such filing has occurred, and in view of the clear and complete authority of said *Duke Power Company* case by reason of the decision of the Court of Errors and Appeals therein just rendered that said resolutions adopted by said Board on June 26, 1941 and all done under and pursuant thereto are wholly null and void on the ground urged in the complaint based on the said provision of Section 54:3-20 there seems no reason to delay the final disposition of this case on said ground by now filing said amended and supplemental complaint or entering an order for that purpose.

19. Said Township, its present and future officials and representatives, may endeavor to enforce and collect said illegal and void assessments and taxes unless prevented by the judgment of this Honorable Court.

Shelton Pitney
SHELTON PITNEY

(Sworn to March 14, 1944.)

Notice of Motion to Dismiss Complaint, Dated March 31, 1944

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment, *Plaintiff*, *vs.* TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey, CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough, and CHARLES V. N. DAVIS, Assessor of the Township of Hillsborough, *Defendants.*	Civil Action No. 1665

To Messrs. PITNEY, HARDIN AND WARD,
Attorneys for Plaintiff,
744 Broad Street,
Newark, 2, N. J.

SIRS:

PLEASE TAKE NOTICE that on Monday, the 27th day of March, 1944, at 10:30 A. M. (E. W. T.), or as soon thereafter as counsel can be heard, at the Court Rooms of the United States District Court, for the District of New Jersey, Post Office Building, Federal Square, Newark, New Jersey, we shall move the Court to dismiss the complaint heretofore filed by the plaintiff and the plaintiff's alleged declaratory judgment suit as set forth therein on one or more of the following grounds:

Notice of Motion to Dismiss Complaint, Dated March 31, 1944

1. That the alleged cause of action set forth in the complaint is not within the jurisdiction of the United States District Court.

2. That the Court in appropriate exercise of its discretion should not entertain jurisdiction in this matter.

3. That the plaintiff has a plain, adequate and complete remedy in the administrative bodies and in the Courts of the State of New Jersey.

Dated March 21, 1944.

Respectfully,

Clarkson A. Cranmer,
Attorney for Defendants.
Kessler & Kessler
Cox & Walburg
Of Counsel.

By Samuel I. Kessler
Harry E. Walburg.

Opinion of Fake, *D. J.*, Denying Defendants' Motion to Dismiss Complaint and Granting Plaintiff's Motion for Summary Judgment

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, Individually and as Trustee of the Duke Endowment, *Plaintiff*, *vs.* TOWNSHIP OF HILLSBOROUGH, Somerset County, N. J., CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough; and CHARLES V. N. DAVIS, Assessor of the Township of Hillsborough, *Defendants*.	Civil Action No. 1665

APPEARANCES:

Messrs. PITNEY, HARDIN & WARD, Attorneys for Plaintiff; by SHELTON PITNEY, Esq., of Counsel.

CLARKSON A. CRANMER, Esq., Messrs. KESSLER & KESSLER, by SAMUEL I. KESSLER, Esq., Messrs. COX & WALBURG, by HARRY E. WALBURG, Esq., Attorneys for Defendants.

FAKE, *District Judge*:

The issues here arise on three motions which will be considered in numerical order:

Opinion of Fake, D. J., Denying Defendants' Motion to Dismiss Complaint and Granting Plaintiff's Motion for Summary Judgment

1. This is a motion for summary judgment declaring four certain resolutions, referred to in Paragraphs 18 and 19 of the Complaint, adopted by the Somerset County Board of Taxation on June 26, 1941, and the assessments of properties made and tax bills issued thereon by the Township of Hillsborough, to be null and void for the reasons alleged in Paragraphs 17 and 21 through 32 of the Complaint herein as by reference thereto will more fully appear.

In this connection the uncontroverted affidavit of Shelton Pitney filed herein discloses that the said resolutions were adopted and the assessments were made without notice to the plaintiff either in her individual or representative capacity, contrary to the form of the Statute, Sec. 54:3-20 of the Revised Statutes of New Jersey, as construed in *Duke Power Co.* v. *State Board of Tax Appeals*, 129 N. J. L. 449, 30 Atl. 2nd 416, affirmed 131 N. J. L. 275, 36 Atl. 2nd 201. The said resolutions and subsequent proceedings thereon by the Township of Hillsborough are therefore null and void and the motion for summary judgment in favor of plaintiff, individually and as trustee against the Township of Hillsborough and Christopher G. Horner, Collector, is granted.

2. This is a motion directed by defendants to a dismissal of the complaint on the ground that (a) the court has no jurisdiction, (b) the court in its discretion should refuse to entertain jurisdiction, (c) that plaintiff has an adequate remedy in the State administrative bodies and in the State courts.

No serious argument has been directed to sustain lack of jurisdiction. As to the discretionary power of the court

the case of *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, is cited as authority. The allegations of discrimination in the Complaint herein differentiate the instant case from that above cited and this court has heretofore passed on it in an opinion filed on July 30, 1942. I there considered carefully the subject of discrimination as it is found in the case law of the State finding that the existing State law is in conflict with the Federal constitution. The reasoning there applies here as well. The point is therefore not well taken here.

As to the adequacy of the remedies before the administrative bodies of the State, it is my view that even though by virtue of the ruling in *Duke Power Co.* v. *State Board of Tax Appeals*, supra, it may be said that there is an adequate State administrative remedy, there is no point in sending the issue there when this court can and does retain jurisdiction on the ground of discrimination. See *Chicago G. W. Ry.* v. *Kendall*, 266 U. S. 94. The motion is denied.

3. This is a motion for judgment in favor of the defendant Charles V. N. Davis, Assessor, on the ground that there is no genuine issue of any material fact as to him. The lack of an issue against him is conceded. A judgment will therefore be entered in his favor against the plaintiff.

The prevailing parties are entitled to their respective costs to be taxed.

Judgment

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action No. 1665

[Same Title]

The plaintiff in the above-entitled cause having duly filed herein a motion for summary judgment, and the defendants having filed a cross motion to dismiss the complaint herein and the plaintiff's suit on the grounds (1) that the alleged cause of action set forth in the complaint is not within the jurisdiction of the United States District Court, (2) that the court in appropriate exercise of its discretion should not entertain jurisdiction and (3) that the plaintiff has a plain, adequate and complete remedy in the administrative bodies and in the courts of the State of New Jersey; and the defendant, Charles V. N. Davis, having separately applied for a summary judgment herein on the ground that there is no genuine issue of any material fact as against him and that the defendant is entitled to judgment as a matter of law;

And said motions having been argued before the court by Shelton Pitney, Esq., of Pitney, Hardin & Ward, attorneys for the plaintiff, and by Harry E. Walburg, Esq., of Cox & Walburg, and Samuel I. Kessler, of Kessler & Kessler, of counsel with the defendants, and the court having considered the arguments of counsel aforesaid and their respective briefs and the entire record in this cause, including the affidavit annexed to the plaintiff's notice of motion for summary judgment (and the depositions therein referred to) and the affidavit annexed to the motion of the defendant, Charles V. N. Davis:

Judgment

It is, on this 7th day of Aug., 1944, ORDERED, ADJUDGED and DECREED:

1. That the complaint herein states no genuine issue as against the defendant Charles V. N. Davis and that for that reason judgment be, and it is hereby, entered in his favor against the plaintiff and the complaint be, and the same is hereby, dismissed as to said defendant Charles V. N. Davis.

2. That the motion of the defendants, Township of Hillsborough, Somerset County, New Jersey, and Christopher G. Horner, Collector of Taxes of said Township of Hillsborough, to dismiss the complaint and the plaintiff's suit be and the same is hereby denied.

3. That the plaintiff's motion for summary judgment against the defendants, Township of Hillsborough, Somerset County, New Jersey, and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, be and the same is hereby granted, and that the four certain resolutions adopted by the Somerset County Board of Taxation at its *ex parte* meeting held on June 26, 1941, as well as all entries and assessments of properties made and tax bills presented in and for said Township of Hillsborough by reason of said resolutions are wholly null and void for the reasons that said resolutions were adopted after April first of each of the tax years 1940 and 1941 upon and in response to the written complaints (in said resolutions called "applications") of the defendant, Christopher G. Horner, the Collector and a resident and taxpayer of the defendant, Township of Hillsborough, so demanding and presented to said Board for that purpose and by said resolutions said Board undertook at an *ex parte* meeting of said Board to assess, and to enter or cause to be entered on the tax lists and duplicates of said Township for assessment in and by said Township for each of said tax years, the intangible

personal properties embraced in said resolutions, entries and assessments on the ground that said properties had been wholly omitted in the assessment for said Township for each of said tax years, without the plaintiff, either personally or as a trustee of the Duke Endowment, being given any notice of said complaints or meeting or being present or represented or accorded any hearing at said meeting and in particular without plaintiff, in either of said capacities, having been given the "five days' notice in writing to the owner by the party complaining" or accorded by said Board the "due examination" or the "hearing" of a judicial character made indispensable prerequisites to the adoption of such resolutions by the mandatory provision of Section 54:3-20 of the Revised Statutes of New Jersey that:

> "On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining, and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing a transcript whereof shall be furnished by the board to the collector, who shall amend his duplicate accordingly."

4. That judgment be entered for her costs to be taxed in favor of the plaintiff and against the defendants, Hillsborough Township, Somerset County, New Jersey, and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough; and that judgment be entered for his costs to be taxed in favor of the defendant, Charles V. N. Davis, against the plaintiff.

GUY L. FAKE,
U. S. D. J.

Notice of Appeal

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, Individually and as Trustee of The Duke Endowment, *Plaintiff*, *vs.* TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey, CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough, and CHARLES V. N. DAVIS, Assessor of the Township of Hillsborough, *Defendants*.	Civil Action No. 1665

NOTICE IS HEREBY GIVEN that Township of Hillsborough, Somerset County, New Jersey, and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, defendants above named, hereby appeal to the Circuit Court of Appeals for the Third Circuit, from the final judgment entered in this action on August 7, 1944.

Dated: November 3, 1944.

KESSLER & KESSLER
By Samuel I. Kessler
9 Clinton Street
Newark, New Jersey.

COX & WALBURG
By Harry E. Walburg
Raymond-Commerce Bldg.
Newark, New Jersey
Attorneys for Appellants

CLARKSON CRANMER
Attorney for Appellants

SAMUEL I. KESSLER
Of Counsel

Statement of Points on Appeal

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

DORIS DUKE CROMWELL, Individually and as Trustee of The Duke Endowment, *Plaintiff*, vs. TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey, CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough, and CHARLES V. N. DAVIS, Assessor of the Township of Hillsborough, *Defendants*.	Civil Action No. 1665

To MESSRS. PITNEY, HARDIN AND WARD
Attorneys for Plaintiff,
744 Broad Street,
Newark 2, New Jersey.

SIRS:

PLEASE TAKE NOTICE that the appellants, Township of Hillsborough and Christopher G. Horner, state that the points upon which they intend to rely on the appeal of this action are as follows:

1. The United States District Court for the District of New Jersey erred in entering summary judgment in favor of the plaintiff and against the appellants.

Statement of Points on Appeal

2. The United States District Court for the District of New Jersey erred in refusing to dismiss plaintiff's complaint.

3. The United States District Court for the District of New Jersey did not have jurisdiction of the subject matter set forth in the plaintiff's complaint under the declaratory judgment act.

4. The United States District Court for the District of New Jersey erred in assuming jurisdiction of the plaintiff's complaint and the alleged cause of action set forth therein.

5. The plaintiff has a plain, speedy and adequate remedy in the administrative bodies and in the Courts of the State of New Jersey.

6. The plaintiff failed to avail herself prior to the filing of her complaint of the plain, speedy and adequate remedy provided by the administrative bodies and the Courts of the State of New Jersey.

7. The United States District Court for the District of New Jersey erred in retaining jurisdiction of the complaint after a dismissal of the complaint as to the defendants, William Lifgrin, W. W. Davenport and Angelo R. Soriano, on the ground that said defendants are necessary and indispensable parties to the action.

CLARKSON A. CRANMER
COX AND WALBURG
KESSLER AND KESSLER,
Attorneys for Defendants,
Township of Hillsborough
and Christopher G. Horner

By SAMUEL I. KESSLER

APPENDIX TO APPELLEE'S BRIEF

Order dismissing complaint as to defendants, William Lifgren, W. W. Davenport, Jr., and Angelo R. Soriano i

Designation by plaintiff of additional portions of record on appeal ii

On motion of appellants to limit record on appeal v

Exhibits 7 and 8 attached to Complaint vii

Exhibits 9 and 10 attached to Complaint ix

Exhibits 11 and 12 attached to Complaint xi

Exhibits 13 and 14 attached to Complaint xiii

Appendix

United States District Court for the District of New Jersey

Civil Action No. —

Doris Duke Cromwell, Individually and as Trustee of the Duke Endowment, Plaintiff,

vs.

Township of Hillsborough, and others, Defendant

Order Dismissing Complaint as to Defendants, William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano

The defendants, William Lifgren, W. W. Davenport, Jr., and Angelo R. Soriano, the members constituting the Somerset County Board of Taxation, having applied to this court, on notice to Pitney, Hardin & Skinner, attorneys for the plaintiff, for an order dismissing the complaint herein as to said defendants and each of them, upon the ground that they and each of them are not necessary parties defendant to the above-entitled action; and this court having considered the motion to dismiss:

It is, on this 8th day of September, 1941, Ordered and Adjudged that the defendants, William Lifgren, W. W. Davenport, Jr., and Angelo R. Soriano, are not necessary parties defendant to the above-entitled action, and that the complaint herein be and the same is hereby dismissed as to said defendants and each of them.

Guy L. Fake, U. S. D. J.

Endorsed: "Filed Sept. 8-1941. At 10:15 o'clock A. M. Benjamin F. Havens, Clerk."

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Civil Action No. 1665

DORIS DUKE CROMWELL, Individually and as Trustee of the Duke Endowment, Plaintiff,

vs.

TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey, Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, and Charles V. N. Davis, Assessor of the Township of Hillsborough, Defendants

DESIGNATION BY PLAINTIFF OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

To Hon. William H. Tallyn, Clerk, United States District Court:

Samuel I. Kessler, Esq., Kessler & Kessler, 9 Clinton Street, Newark, N. J., Attorney for Defendants.

Messrs. Cox & Walburg, Raymond-Commerce Building, Newark, N. J., Attorney for Defendants.

GENTLEMEN:

Please take notice that the appellee, Doris Duke Cromwell, Individually and as Trustee of The Duke Endowment, hereby designates the following additional portions of the record, proceedings, and evidence to be included in the record on appeal in the above-entitled action:

1. Affidavit of Shelton Pitney in support of motion of plaintiff for summary judgment, verified on March 14, 1944 and attached to notice of motion of plaintiff for summary judgment dated March 14, 1944.

2. The following depositions taken in the cause and filed in this Court and expressly made parts of the above-mentioned affidavit by its references thereto:

November 8, 1941:

William Irving Frost, Justus H. Cooley, George H. Dorp, John P. Koehler, Amasa A. Storr, Margaret Killiger, John E. Betzold, Samuel P. Sutphen, Charles D. Erdley, Clarence Scheuerman, Washington K. Harris,

Margaret E. Demler, Samuel J. Conklin, George W. Mason, John Przybyla, Charles Opie, W. Walter French, William H. Tiger, Robert W. Gutleber, William H. Higgins;

November 13, 1941:

Harry McMurtry, Charles V. N. Davis;

December 5, 1941:

Walter C. Linbarger, Alonzo Y. Taylor, Christopher G. Horner, William Lifgren, Edward Lindstrom, J. Irving Stryker, Everest L. Belli, Angelo R. Soriano, William W. Davenport, Jr.;

December 8, 1941:

Christopher G. Horner;

December 11, 1941:

Christoper G. Horner, William Lifgren;

December 23, 1941:

William Lifgren, Edward Lindstrom;

January 5, 1942:

Edward Lindstrom, J. Irving Stryker, Everest L. Belli;

January 6, 1942:

Angelo R. Soriano, William W. Davenport, Jr.;

January 13, 14 and 26th, 1942:

J. Glenn Anderson, James E. Mullaney, Alfred L. Kirby;

January 20, 1942:

Doris Duke Cromwell.

Dated: November 21, 1944.

Respectfully, Pitney, Hardin & Ward, Attorneys for Plaintiff, Doris Duke Cromwell, Individually and as Trustee of The Duke Endowment. Shelton Pitney, of Counsel.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8780

TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey, and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, Appellants,

vs.

DORIS DUKE CROMWELL, Individually and as Trustee of the Duke Endowment, Appellee

ORDER ON MOTION OF APPELLANTS TO LIMIT RECORD ON APPEAL.

—Filed December 8, 1944

Present: Goodrich and McLaughlin, JJ.

The attorneys for appellants having on the 28th day of November, 1944, served on the attorneys for appellee a notice of motion to limit the record on appeal by eliminating therefrom the forty-five depositions designated in paragraph 2 of the "Designation by Plaintiff of Additional Portions of Record on Appeal" (filed in the District Court on November 21, 1944), and said motion to limit having been argued orally before this Court on December 4th, 1944 by Edward R. McGlynn, Esq., in favor of the motion, and by Shelton Pitney, Esq., in opposition thereto; and good reason appearing herefor;

It is, on this 8th day of December, 1944, ordered that the appellants' motion to limit the record on appeal by excluding therefrom the forty-five depositions designated in paragraph 2 of appellee's designation of additional portions of record on appeal filed November 21, 1944, be and the same is hereby granted, but upon condition that appellants include in the record on appeal (in addition to the portions of the record designated by appellants) the following:

1. Affidavit of Shelton Pitney in support of motion of plaintiff-appellee for summary judgment verified March 14, 1944;

2. Designation by plaintiff-appellee of additional portions of record on appeal filed in the District Court on November 21, 1944;

3. Motion on behalf of appellants to limit record on appeal served on plaintiff-appellee's attorneys on November 28, 1944; and

4. This order.

Goodrich, J.

We hereby approve of the form of the foregoing order.
Pitney, Hardin & Ward, Attorneys for Appellee.

EXHIBITS 7 and 8
ATTACHED TO COMPLAINT

FINAL TAX NOTICE—1940

TOWNSHIP OF HILLSBOROUGH

C. G. HORNER, *Collector*

INTEREST AT THE RATE OF 6% WILL BE ADDED ON DELINQUENT TAXES.

BRING THIS BILL WITH YOU OR SEND IT BY MAIL WHEN YOU PAY TAX.

NESHANIC STATION, N. J. R. D. No. 1

IF RECEIPT OR INFORMATION IS REQUIRED, ENCLOSE STAMP.

IF YOU CHANGE YOUR ADDRESS PLEASE NOTIFY COLLECTOR.

RATES AND APPORTIONMENT OF TAXES

STATE SCHOOL TAX	$ .288	$ 5,977.73
STATE SOLDIERS' BONUS	.021	681.68
COUNTY TAX	.613	19,130.13
COUNTY LIBRARY TAX	.030	933.30
TOWNSHIP SCHOOL TAX	1.338	41,482.50
TOWNSHIP TAX	.840	26 939.93
	$3.13	$96,775.30

1940 Tax 1/3 ~~3rd~~ Quarter $

DUE AUG. 1st. DELINQUENT THEREAFTER

If paid by check and no receipt is required detach this stub and enclose with your remittance. Your cancelled check will be your receipt.

Name Mrs. Doris Dube Cromwell
Block No. ____ Page No. 8
Lot No ____ Line No. 14

AMOUNT	936849 01
DOG TAX	
TOTAL TAX	936849 01
INTEREST	
TOTAL	

☐ Certified Check ☐ Check ☐ Money Order ☐ Cash

Cash Book Page ____

Collector

Date Paid ____

1940 Tax 31 4th Quarter $

DUE NOV. 1st. DELINQUENT THEREAFTER

If paid by check and no receipt is required detach this stub and enclose with your remittance. Your cancelled check will be your receipt.

Name Mrs. Doris Dube Cromwell
Block No. ____ Page No. 8
Lot No ____ Line No. 14

AMOUNT	936849 01
DOG TAX	
TOTAL TAX	936849 01
INTEREST	
TOTAL	

☐ Certified Check ☐ Check ☐ Money Order ☐ Cash

Cash Book Page ____

Collector

Date Paid ____

3rd QUARTER OF TAX DUE AUG. 1st, 1940. DELINQUENT THEREAFTER

Received Payment 3rd Quarter 3 (102) ____ 19____

Collector of Taxes

$ ____

4th QUARTER OF TAX DUE NOV. 1st, 1940. DELINQUENT THEREAFTER

Received Payment 4th Quarter $ (31) ____ 19____

Collector of Taxes

$ ____

VALUATIONS

Block No.	Lot No.	DUPLICATE Page	DUPLICATE Line	DESCRIPTION and LOCATION	Land	Buildings	Personal	Total Value of Real & Personal	Exemptions	Total Net Valuations
		8	14				600544 24			600544 24

TAXES

Total Amount Tax—1940	3rd Quarterly Installment	4th Quarterly Installment
1873698.02		

Notice of Account Year ____

Mrs Doris Dube Cromwell
Somerville, New Jersey

CREDIT			
TAX DUE IN 3rd & 4th QUARTERS	1873698 02		
DOG TAX			
TOTAL TAX	1873698 02		
INTEREST			
TOTAL			

READ CAREFULLY

Chapter 266, P. L. 1933 provides for the quarterly payment of taxes as follows: Quarterly installments on the following dates: Feb. 1, 1940 - May 1, 1940 - Aug. 1, 1940 - Nov. 1, 1940.

SALE OF LAND FOR UNPAID TAXES— When any municipal lien on real property remains unpaid on July 1 in the year following the date when it became in arrears (December 1st, the collector shall enforce the lien by sale of the property. (Laws of 1918, Chapter 237 sec. 16)

UNPAID TAXES ON PERSONAL PROPERTY—Where any personal taxes remain in arrears after December 1st it shall be the duty of the Collector to enforce the same by distress and sale of the goods or chattels or by arrest. (Excerpt from Laws of 1918, Chapter 236, sec. 606.)

LIEN—Unpaid taxes on land with interest, etc., becomes a lien on and after December 1st. (Chapter 237, Laws of 1918).

APPEALS—All appeals must be filed with the Somerset County Board of Taxation, Court House, Somerville, N. J., on or before Aug. 15, 1940. Necessary blanks can be secured from the local Assessor or by writing the Secretary of the Board at Somerville. Two appeal blanks must be filled out, one copy served on the Clerk of the municipality where the assessment has been levied and the other filed with the Secretary of the Board. No appeal can be filed by law after Aug. 15, 1940, and the Board cannot accept any appeal for filing after that date. This provision of law must be strictly enforced and cannot be waived.

EXHIBITS 9 and 10
ATTACHED TO COMPLAINT

FINAL TAX NOTICE — 1941

TOWNSHIP OF HILLSBOROUGH

C. G. HORNER, *Collector*

INTEREST AT THE RATE OF 6% WILL BE ADDED ON DELINQUENT TAXES.

BRING THIS BILL WITH YOU OR SEND IT BY MAIL WHEN YOU PAY TAX.

MILLSTONE STATION, N. J. R. D. No. 1

IF RECEIPT OR INFORMATION IS REQUIRED, ENCLOSE STAMP.

IF YOU CHANGE YOUR ADDRESS, PLEASE NOTIFY COLLECTOR.

RATES AND APPORTIONMENT OF TAXES

STATE SCHOOL TAX	$ .358	$ 8,636.04
COUNTY TAX	.883	21,277.03
COUNTY LIBRARY TAX	.030	697.10
TOWNSHIP SCHOOL TAX	1.610	43,295.00
TOWNSHIP TAX	.709	21,961.28
	3.10	$90,736.44

3rd QUARTER OF TAX DUE AUG. 1st, 1941. DELINQUENT THEREAFTER

Received Payment 3rd Quarter $ 1/2 19___

Collector of Taxes

$ _____

4th QUARTER OF TAX DUE NOV. 1st, 1941. DELINQUENT THEREAFTER

Received Payment 4th Quarter $ 19___

Collector of Taxes

$ _____

Lot No.	DUPLICATE Page	DUPLICATE Line	DESCRIPTION and LOCATION	VALUATIONS Land	Buildings	Personal	Total Value of Real & Personal	Exemptions	Total Net Valuations	TAXES Total Amount Tax—1941	3rd Quarterly Installment	4th Quarterly Installment
	10	14				690,540			690,540	1861687.14		

Name of Assessee Year _____

Mrs Dorris Dubs Cromwell
Somerville New Jersey

CREDIT			
TAX DUE IN 3rd & 4th QUARTERS	1861687	14	
DOG TAX			
TOTAL TAX	1861687	14	
INTEREST			
TOTAL			

1941 Tax 1/2 — 3rd Quarter $

DUE AUG. 1st. DELINQUENT THEREAFTER

If paid by check and no receipt is required detach this stub and enclose with your remittance. Your cancelled check will be your receipt.

Name Mrs. Dorris Dubs Cromwell
Block No. _____ Page No. 10
Lot No. _____ Line No. 14

AMOUNT	930843	57
DOG TAX		
TOTAL TAX	930843	57
INTEREST		
TOTAL		

☐ Certified Check
☐ Check
☐ Money Order
☐ Cash

Cash Book Page ____

Collector

Date Paid _____

1941 Tax 2nd 4th Quarter $

DUE NOV. 1st. DELINQUENT THEREAFTER

If paid by check and no receipt is required detach this stub and enclose with your remittance. Your cancelled check will be your receipt.

Name Mrs. Dorris Dubs Cromwell
Block No. _____ Page No. 14
Lot No. _____ Line No. 14

AMOUNT	930843	57
DOG TAX		
TOTAL TAX	930843	57
INTEREST		
TOTAL		

☐ Certified Check
☐ Check
☐ Money Order
☐ Cash

Cash Book Page ____

Collector

Date Paid _____

READ CAREFULLY

Chapter 366, P. L. 1933 provides for the quarterly payment of taxes as follows: Quarterly installments on the following dates: Feb. 1941 - May 1, 1941 - Aug. 1, 1941 - Nov. 1, 1941.

SALE OF LAND FOR UNPAID TAXES — When any municipal lien on real property remains unpaid on July 1 in the year following the date when it became in arrears (December 1st, the collector shall enforce the lien by sale of the property. (Laws of 1918, Chapter 237 sec. 16)

UNPAID TAXES ON PERSONAL PROPERTY — Where any personal * taxes remain in arrears after December 1st it shall be the duty of the Collector to enforce the same by distress and sale of the goods or chattels or by arrest. (Excerpt from Laws of 1918, Chapter 236, sec. 686.)

LIEN — Unpaid taxes on land with interest, etc. becomes a lien on and after December 1st. (Chapter 237, Laws of 1918).

APPEALS — All appeals must be filed with the Somerset County Board of Taxation, Court House, Somerville, N. J., on or before Aug. 15, 1941. Necessary blanks can be secured from the local Assessor or by writing the Secretary of the Board at Somerville. Two appeal blanks must be filled out, one copy served on the Clerk of the municipality where the assessment has been levied and the other filed with the Secreary of the Board. No Appeal can be filed by law after Aug. 15, 1941, and the Board cannot accept any appeal for filing after that date. This provision of law must be strictly enforced and cannot be waived.

EXHIBITS 11 and 12
ATTACHED TO COMPLAINT

FINAL TAX NOTICE—1940

TOWNSHIP OF HILLSBOROUGH

C. G. HORNER, *Collector*

NESHANIC STATION, N. J. R. D. No. 1

INTEREST AT THE RATE OF 6% WILL BE ADDED ON DELINQUENT TAXES.

BRING THIS BILL WITH YOU OR SEND IT BY MAIL WHEN YOU PAY TAX.

IF RECEIPT OR INFORMATION IS REQUIRED, ENCLOSE STAMP.

IF YOU CHANGE YOUR ADDRESS PLEASE NOTIFY COLLECTOR.

RATES AND APPORTIONMENT OF TAXES

STATE SCHOOL TAX	$ .338	$ 8,977.73
STATE SOLDIERS' BONUS	.021	681.68
COUNTY TAX	.613	19,190.12
COUNTY LIBRARY TAX	.020	638.30
TOWNSHIP SCHOOL TAX	1.338	41,482.80
TOWNSHIP TAX	.840	25 999.92
	$3.12	$96,775.20

3rd QUARTER OF TAX DUE AUG. 1st, 1940. DELINQUENT THEREAFTER

Received Payment 3rd Quarter $ 152 ..... 19....

Collector of Taxes

$.....

4th QUARTER OF TAX DUE NOV. 1st, 1940. DELINQUENT THEREAFTER

Received Payment 4th Quarter $ 3e ..... 19....

Collector of Taxes

$.....

VALUATIONS

Block No.	Lot No.	DUPLICATE Page	DUPLICATE Line	DESCRIPTION and LOCATION	Land	Buildings	Personal	Total Value of Real & Personal	Exemptions	Total Net Valuations
		8	12							

Notice of Arrears Year .....

Mrs Doris Duke Cromwell
Trustee of The Duke Endowment
Somerville, New Jersey

TAXES

	Total Amount Tax—1940	3rd Quarterly Installment	4th Quarterly Installment
	505084363		
CREDIT	—		
TAX DUE IN 3rd & 4th QUARTERS	505084363		
DOG TAX	—		
TOTAL TAX	505084363		
INTEREST			
TOTAL			

1940 Tax 3rd Quarter

DUE AUG. 1st. DELINQUENT THEREAFTER

If paid by check and no receipt is required detach this stub and enclose with your remittance. Your cancelled check will be your receipt.

Trustee of Du

Name Doris Duke Cromwell Duke Endowment

Block No. ..... Page No. 8

Lot No. ..... Line No. 12

AMOUNT	252542182	☐ Certified Check
DOG TAX	—	☐ Check
TOTAL TAX	252542182	☐ Money Order
INTEREST		☐ Cash
TOTAL		Cash Book Page.....

Collector

Date Paid .....

1940 Tax 4th Quarter

DUE NOV. 1st. DELINQUENT THEREAFTER

If paid by check and no receipt is required detach this stub and enclose with your remittance. Your cancelled check will be your receipt.

Trustee of Du

Name Doris Duke Cromwell Duke Endowment

Block No. ..... Page No. 8

Lot No. ..... Line No. 12

AMOUNT	252542181	☐ Certified Check
DOG TAX	—	☐ Check
TOTAL TAX	252542181	☐ Money Order
INTEREST		☐ Cash
TOTAL		Cash Book Page.....

Collector

Date Paid .....

READ CAREFULLY

Chapter 266, P. L. 1938 provides for the quarterly payment of taxes as follows: Quarterly installments on the following dates: Feb. 1, 1940 - May 1, 1940 - Aug. 1, 1940 - Nov. 1, 1940.

SALE OF LAND FOR UNPAID TAXES— When any municipal lien on real property remains unpaid on July 1 in the year following the date when it became in arrears (December 1st) the collector shall enforce the lien by sale of the property. (Laws of 1918, Chapter 237 sec. 16)

UNPAID TAXES ON PERSONAL PROPERTY—Where any personal taxes remain in arrears after December 1st it shall be the duty of the Collector to enforce the same by distress and sale of the goods or chattels or by arrest. (Excerpt from Laws of 1918, Chapter 236, sec. 696.)

LIEN—Unpaid taxes on land with interest, etc., becomes a lien on and after December 1st. (Chapter 237, Laws of 1918).

APPEALS—All appeals must be filed with the Somerset County Board of Taxation, Court House, Somerville, N. J., on or before Aug. 15, 1940. Necessary blanks can be secured from the local Assessor or by writing the Secretary of the Board at Somerville. Two appeal blanks must be filled out, one copy served on the Clerk of the municipality where the assessment has been levied and the other filed with the Secretary of the Board. No appeal can be filed by law after Aug. 15, 1940, and the Board cannot accept any appeal for filing after that date. This provision of law must be strictly enforced and cannot be waived.

EXHIBITS 13 and 14
ATTACHED TO COMPLAINT

FINAL TAX NOTICE — 1941

TOWNSHIP OF HILLSBOROUGH

C. G. HORNER, *Collector*

NESHANIC STATION, N. J. R. D. No. 1

INTEREST AT THE RATE OF 6% WILL BE ADDED ON DELINQUENT TAXES.

BRING THIS BILL WITH YOU OR SEND IT BY MAIL WHEN YOU PAY TAX.

IF RECEIPT OR INFORMATION IS REQUIRED, ENCLOSE STAMP.

IF YOU CHANGE YOUR ADDRESS, PLEASE NOTIFY COLLECTOR.

RATES AND APPORTIONMENT OF TAXES

STATE SCHOOL TAX	$ .321	$ 8,036.04
COUNTY TAX	.083	21,377.03
COUNTY LIBRARY TAX	.030	837.10
TOWNSHIP SCHOOL TAX	1.410	43,235.00
TOWNSHIP TAX	.700	21,861.30
	2.10	$94,736.44

4 QUARTER OF TAX DUE AUG. 1st, 1941. DELINQUENT THEREAFTER

Received Payment 2nd Quarter $ 102 ..... 19....

..... Collector of Taxes

$.....

4th QUARTER OF TAX DUE NOV. 1st, 1941. DELINQUENT THEREAFTER

Received Payment 4th Quarter $ 37 ..... 19....

..... Collector of Taxes

$.....

VALUATIONS										TAXES		
Lot No.	DUPLICATE Page	DUPLICATE Line	DESCRIPTION and LOCATION	Land	Buildings	Personal	Total Value of Real & Personal	Exemptions	Total Net Valuations	Total Amount Tax—1941	3rd Quarterly Installment	4th Quarterly Installment
	10	12				6118 Corr			5 1875 Corr	5018/66 4/3		

Notice of Amount Due .....

Mrs. Doris Duke Cromwell
Trustee of the Duke Endowment
Somerville, New Jersey

CREDIT	-		
TAX DUE IN 3rd & 4th QUARTERS	5018/66 4/3		
DOG TAX			
TOTAL TAX	5018/66 4/3		
INTEREST			
TOTAL			

1941 Tax 1st 2nd 3rd Quarters

DUE AUG. 1st. DELINQUENT THEREAFTER

If paid by check and no receipt is required detach this stub and enclose with your remittance. Your cancelled check will be your receipt.

Name Doris Duke Cromwell, Duke Endowment Trustee of the
Block No. ..... Page No. .....
Lot No. ..... Line No. .....

AMOUNT	2509233	22
DOG TAX		-
TOTAL TAX	2509233	22
INTEREST		
TOTAL		

☐ Certified Check
☐ Check
☐ Money Order
☐ Cash

Cash Book Page.....

.....
Collector

Date Paid .....

1941 Tax 3rd 4th Quarters

DUE NOV. 1st. DELINQUENT THEREAFTER

If paid by check and no receipt is required detach this stub and enclose with your remittance. Your cancelled check will be your receipt.

Name Doris Duke Cromwell, Duke Endowment Trustee of the
Block No. ..... Page No. .....
Lot No. ..... Line No. .....

AMOUNT	2509233	21
DOG TAX		-
TOTAL TAX	2509233	21
INTEREST		
TOTAL		

☐ Certified Check
☐ Check
☐ Money Order
☐ Cash

Cash Book Page.....

.....
Collector

Date Paid .....

READ CAREFULLY

Chapter 116, P. L. 1933 provides for the quarterly payment of taxes as follows: Quarterly installments on the following dates: Feb 15th - May 1, 1941

SALE OF LAND FOR UNPAID TAXES — When any municipal lien on real property remains unpaid on July 1 in the year following the date when it became in arrears (December 1st,) the collector shall advertise the property for sale. (Laws of 1918, Chapter 247, sec. 16)

UNPAID TAXES ON PERSONAL PROPERTY — Where any personal taxes remain in arrears after December 1st it shall be the duty of the Collector to enforce the same by distress and sale of the goods or chattels or by arrest. (Excerpt from Laws of 1918, Chapter 236, sec. 60.)

LIEN — Unpaid taxes on land with interest, etc., becomes a lien on the land as of December 1st. (Chapter 247, Laws of 1918).

APPEALS — All appeals must be filed with the Somerset County Board of Taxation, Court House, Somerville, N. J., on or before Aug. 15, 1941. Necessary blanks can be secured from the local Assessor or by writing the Secretary of the Board at Somerville. Two appeal blanks must be filled out, one copy served on the Clerk of the municipality where the assessment has been levied and the other filed with the Secretary of the Board. No Appeal can be filed by law after Aug. 15, 1941, and the Board cannot accept any appeal for filing after that date. This provision of law must be strictly enforced and cannot be waived.

[fol. 137] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8780

TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey, and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, Appellants,

vs.

DORIS DUKE CROMWELL, Individually and as Trustee of The Duke Endowment, Appellee

MOTION ON BEHALF OF APPELLANTS TO LIMIT RECORD ON APPEAL

To Messrs. Pitney, Hardin & Ward, Attorneys for Appellee, 744 Broad Street, Newark 2, N. J.

SIRS:

Please Take Notice that on Monday, December 4, 1944, at 10:30 o'clock in the forenoon, Eastern War Time, or as soon thereafter as counsel can be heard, we shall move the above entitled Court at the Court Rooms, United States Court House, Ninth and Chestnut Streets, Philadelphia, Pennsylvania, for an order limiting the record on appeal in the above entitled matter, and particularly eliminating from the said record of appeal forty-five depositions taken by way of discovery and as more particularly set forth in paragraph 2 of the designation by the appellee of additional portions of the record on appeal, a copy of which is attached hereto, made a part hereof and marked Schedule A, on one or more of the following grounds:

1. That the said depositions are irrelevant and immaterial to the issues raised on this appeal. See appellant's statement of points, copy of which is attached hereto and marked Schedule B.

[fol. 138] 2. That all of the depositions referred to, but that of the plaintiff, were taken on behalf of the appellee on discovery proceedings pursuant to the Federal Rules of Civil Procedure. That there has not been any trial on the merits in the court below and that none of said depositions were offered in evidence and that all of the persons whose depositions were taken on behalf of the plaintiff were and

are residents of the State of New Jersey and are within the jurisdiction of the United States District Court for the District of New Jersey.

3. That the summary judgment of the court below was entered on a question of law based on the pleadings and affidavit made by counsel for the plaintiff. See opinion and judgment of court below attached hereto and marked Schedules C and D.

4. That all of the said depositions taken by the plaintiff were for the purpose of discovery before trial on the question of alleged intentional discrimination of the assessment of intangible personal property taxes against the plaintiff and that the question of the alleged intentional discrimination was not considered or determined by the court below.

Respectfully, Clarkson A. Cranmer, Kessler & Kessler, Cox and Walburg, Attorneys for Appellants, by Samuel I. Kessler, of Counsel.

[fol. 139] SCHEDULE "A"

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Civil Action No. 1665

DORIS DUKE CROMWELL, Individually and as Trustee of The Duke Endowment, Plaintiff,

vs.

TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey; Christopher G. Horner, Collector of Taxes of the Township of Hillsborough; and Charles V. N. Davis, Assessor of the Township of Hillsborough, Defendants

DESIGNATION BY PLAINTIFF OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

To: Hon. William H. Tallyn, Clerk, United States District Court; Samuel A. Kessler, Esq., Kessler & Kessler, 9 Clinton Street, Newark, N. J., Attorney for Defendants; Messrs. Cox & Walburg, Raymond-Commerce Building, Newark, N. J., Attorneys for Defendants

GENTLEMEN:

Please Take Notice that the appellee, Doris Duke Cromwell, Individually and as Trustee of The Duke Endowment,

hereby designates the following additional portions of the record, proceedings, and evidence to be included in the record on appeal in the above-entitled action:

1. Affidavit of Shelton Pitney in support of motion of plaintiff for summary judgment, verified on March 14, 1944 and attached to notice of motion of plaintiff for summary judgment dated March 14, 1944.

[fol. 140] 2. The following depositions taken in the cause and filed in this Court and expressly made parts of the above-mentioned affidavit by its references thereto:

November 5, 1941:

William Irving Frost, Justus H. Cooley, George H. Dorn, John P. Koehler, Amasa A. Storr, Margaret Killiger, John E. Betzold, Samuel P. Sutphen, Charles D. Erdley, Clarence Scheuerman, Washington K. Harris, Margaret E. Demler, Samuel J. Conklin, George W. Mason, John Przybyla, Charles Opie, W. Walter French, William H. Tiger, Robert W. Gutleber, William H. Higgins;

November 13, 1941:

Harry McMurtry, Charles V. N. Davis;

December 5, 1941:

Walter C. Linbarger, Alonzo Y. Taylor, Christopher G. Horner, William Lifgren, Edward Lindstrom, J. Irving Stryker, Everest L. Belli, Angelo R. Soriano, William W. Davenport, Jr.;

December 8, 1941:

Christopher G. Horner;

December 11, 1941:

Christopher G. Horner, William Lifgren;

December 23, 1941:

William Lifgren, Edward Lindstrom;

January 5, 1942:

Edward Lindstrom, J. Irving Stryker, Everest L. Belli;

January 6, 1942:

Angelo R. Soriano, William W. Davenport, Jr.;

January 13, 14 and 26th, 1942:

J. Glenn Anderson, James E. Mullaney, Alfred L. Kirby;

January 20, 1942:
Doris Duke Cromwell.

Dated: November 21, 1944.

Respectfully, Pitney, Hardin & Ward, Attorneys for Plaintiff, Doris Duke Cromwell, Individually and as Trustee of The Duke Endowment.

Shelton Pitney, of Counsel.

[fol. 141] SCHEDULE "B"

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Civil Action No. 1665

DORIS DUKE CROMWELL, Individually and as Trustee of The Duke Endowment, Plaintiff,

vs.

TOWNSKIP OF HILLSBOROUGH, Somerset County, New Jersey; Christopher G. Horner, Collector of Taxes of the Township of Hillsborough; and Charles V. N. Davis, Assessor of the Township of Hillsborough, Defendants

STATEMENT OF POINTS ON APPEAL TO UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

To Messrs. Pitney, Hardin and Ward, Attorneys for Plaintiff, 744 Broad Street, Newark 2, New Jersey.

SIRS:

Please Take Notice that the appellants, Township of Hillsborough and Christopher G. Horner, state that the points upon which they intend to rely on the appeal of this action are as follows:

1. The United States District Court for the District of New Jersey erred in entering summary judgment in favor of the plaintiff and against the appellants.

2. The United States District Court for the District of New Jersey erred in refusing to dismiss plaintiff's complaint.

3. The United States District Court for the District of New Jersey did not have jurisdiction of the subject matter set forth in the plaintiff's complaint under the declaratory judgment act.

4. The United States District Court for the District of New Jersey erred in assuming jurisdiction of the plain-
[fol. 142] tiff's complaint and the alleged cause of action set forth therein.

5. The plaintiff has a plain, speedy and adequate remedy in the administrative bodies and in the Courts of the State of New Jersey.

6. The plaintiff failed to avail herself prior to the filing of her complaint of the plain, speedy and adequate remedy provided by the administrative bodies and the Courts of the State of New Jersey.

7. The United States District Court for the District of New Jersey erred in retaining jurisdiction of the complaint after a dismissal of the complaint as to the defendants, William Lifgrin, W. W. Davenport and Angelo R. Soriano, on the ground that said defendants are necessary and indispensable parties to the action.

Clarkson A. Cranmer, Cox and Walburg, Kessler and Kessler, Attorneys for Defendants, Township of Hillsborough, and Christopher G. Horner, by Samuel I. Kessler.

[fol. 143] SCHEDULE "C"

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Civil No. 1665

DORIS DUKE CROMWELL, Individually and as Trustee of The Duke Endowment, Plaintiff,

vs.

TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey; Christopher G. Horner, Collector of Taxes of the Township of Hillsborough; and Charles V. N. Davis, Assessor of the Township of Hillsborough, Defendants

OPINION

Appearances:

Messrs. Pitney, Hardin & Ward, Attorneys for Plaintiff, by Shelton Pitney, Esq., of Counsel.

Clarkson A. Cranmer, Esq., Messrs. Kessler & Kessler, by Samuel I. Kessler, Esq., Messrs. Cox & Walburg, by Harry E. Walburg, Esq., Attorneys for Defendants.

FAKE, District Judge:

The issues here arise on three motions which will be considered in numerical order.

1. This is a motion for summary judgment declaring four certain resolutions, referred to in Paragraphs 18 and 19 of the Complaint, adopted by the Somerset County Board of Taxation on June 26, 1941, and the assessments of properties made and tax bills issued thereon by the Township of Hillsborough, to be null and void for the reasons alleged in paragraphs 17 and 21 through 32 of the Complaint herein as by reference thereto will more fully appear.

[fol. 144] In this connection the uncontroverted affidavit of Shelton Pitney filed herein discloses that the said resolutions were adopted and the assessments were made without notice to the plaintiff either in her individual or representative capacity, contrary to the form of the Statute, Sec. 54:3-20 of the Revised Statutes of New Jersey, as construed in Duke Power Co. v. State Board of Tax Appeals, 129 N. J. L. 449, 30 Atl. 2nd, 416, affirmed 131 N. J.

L. 275, 36 Atl. 2nd. 201. The said resolutions and subsequent proceedings thereon by the Township of Hillsborough are therefore null and void and the motion for summary judgment in favor of plaintiff, individually and as trustee against the Township of Hillsborough and Christopher G. Horner, Collector, is granted.

2. This is a motion directed by defendants to a dismissal of the complaint on the ground that (a) the court has no jurisdiction, (b) the court in its discretion should refuse to entertain jurisdiction, (c) that plaintiff has an adequate remedy in the State administrative bodies and in the State courts.

No serious argument has been directed to sustain lack of jurisdiction. As to the discretionary power of the court the case of Great Lakes Co. v. Huffman, 319 U. S. 293, is cited as authority. The allegations of discrimination in the Complaint herein differentiate the instant case from that above cited and this court has heretofore passed on it in an opinion filed on July 30, 1942. I there considered carefully the subject of discrimination as it is found in the case law of the State finding that the existing State law is in conflict with the Federal constitution. The reasoning there applies here as well. The point is therefore not well taken here.

[fol. 145] As to the adequacy of the remedies before the administrative bodies of the State, it is my view that even though by virtue of the ruling in Duke Power Co. v. State Board of Tax Appeals, supra, it may be said that there is an adequate State administrative remedy, there is no point in sending the issue there when this court can and does retain jurisdiction on the ground of discrimination. See Chicago G. W. Ry. v. Kendall, 266 U. S. 94. The motion is denied.

3. This is a motion for judgment in favor of the defendant Charles V. N. Davis, Assessor, on the ground that there is no genuine issue of any material fact as to him. The lack of an issue against him is conceded. A judgment will therefore be entered in his favor against the plaintiff.

The prevailing parties are entitled to their respective costs to be taxed.

[fol. 146] SCHEDULE "D"

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Civil Action No. 1665

DORIS DUKE CROMWELL, Individually and as Trustee of The Duke Endowment, Plaintiff,

vs.

TOWNSHIP OF HILLSBOROUGH, Somerset County, New Jersey, CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough, and CHARLES V. N. DAVIS, Assessor of the Township of Hillsborough, Defendants.

JUDGMENT

The plaintiff in the above-entitled cause having duly filed herein a motion for summary judgment, and the defendants having filed a cross motion to dismiss the complaint herein and the plaintiff's suit on the grounds (1) that the alleged cause of action set forth in the complaint is not within the jurisdiction of the United States District Court, (2) that the court in appropriate exercise of its discretion should not entertain jurisdiction and (3) that the plaintiff has a plain, adequate and complete remedy in the administrative bodies and in the courts of the State of New Jersey; and the defendant, Charles V. N. Davis, having separately applied for a summary judgment herein on the ground that there is no genuine issue of any material fact as against him and that the defendant is entitled to judgment as a matter of law;

And said motions having been argued before the court by Shelton Pitney, Esq., of Pitney, Hardin & Ward, attorneys for the plaintiff, and by Harry E. Walburg, Esq., of Cox & Walburg, and Samuel I. Kessler, of Kessler & Kessler, of counsel with the defendants, and the court [fol. 147] having considered the arguments of counsel aforesaid and their respective briefs and the entire record in this cause, including the affidavit annexed to the plaintiff's notice of motion for summary judgment (and the depositions therein referred to) and the affidavit annexed to the motion of the defendant, Charles V. N. Davis:

It is, on this 7th day of August, 1944, Ordered, Adjudged and Decreed:

1. That the complaint herein states no genuine issue as against the defendant Charles V. N. Davis and that for that reason judgment be, and it is hereby, entered in his favor against the plaintiff and the complaint be, and the same is hereby dismissed as to said defendant Charles V. N. Davis.

2. That the motion of the defendants, Township of Hillsborough, Somerset County, New Jersey, and Christopher G. Horner, Collector of Taxes of said Township of Hillsborough, to dismiss the complaint and the plaintiff's suit be and the same is hereby denied.

3. That the plaintiff's motion for summary judgment against the defendants, Township of Hillsborough, Somerset County, New Jersey, and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, be and the same is hereby granted, and that the four certain resolutions adopted by the Somerset County Board of Taxation at its *ex parte* meeting held on June 26, 1941, as well as all entries and assessments of properties made and tax bills presented in and for said Township of Hillsborough by reason of said resolutions are wholly null and void for the reasons that said resolutions were adopted after April first of each of the tax years 1940 and 1941 upon and in response to the written complaints (in said resolutions [fol. 148] called "applications") of the defendant, Christopher G. Horner, the Collector and a resident and taxpayer of the defendant, Township of Hillsborough, so demanding and presented to said Board for that purpose and by said resolutions said Board undertook at an *ex parte* meeting of said Board to assess, and to enter or cause to be entered on the tax lists and duplicates of said Township for assessment in and by said Township for each of said tax years, the intangible personal properties embraced in said resolutions, entries and assessments on the ground that said properties had been wholly omitted in the assessment for said Township for each of said tax years, without the plaintiff, either personally or as a trustee of the Duke Endowment, being given any notice of said complaints or meeting or being present or represented or accorded any hearing at said meeting and in particular without plaintiff, in either of said capacities, having been given the "five days' notice in writing to the owner by the party complaining" or accorded by said Board the "due

examination" or the "hearing" of a judicial character made indispensable prerequisites to the adoption of such resolutions by the mandatory provision of Section 54:3-20 of the Revised Statutes of New Jersey that:

> "On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining, and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing a transcript whereof shall be furnished by the board to the collector, who shall amend his duplicate accordingly."

4. That judgment be entered for her costs to be taxed in favor of the plaintiff and against the defendants, Hillsborough Township, Somerset County, New Jersey, and [fol. 149] Christopher G. Horner, Collector of Taxes of the Township of Hillsborough; and that judgment be entered for his costs to be taxed in favor of the defendant, Charles V. N. Davis, against the plaintiff.

Guy L. Fake, U. S. D. J.

Endorsements: Motion of Appellants to Limit Record on Appeal Received & Filed Nov. 29, 1944. Wm. P. Rowland, Clerk.

(The Order of December 8, 1944 granting this motion appears in the Appendix to Appellee's Brief.)

[fol. 150] [Endorsed:] 8780. United States Circuit Court of Appeals for the Third Circuit, Township of Hillsborough, etc., et al., Appellants, vs. Doris Duke Cromwell, individually and as Trustee of the Duke Endowment, Appellee, No. 8780. Motion on Behalf of Appellants to Limit Record on Appeal, Clarkson A. Cranmer, Cox and Walburg, Kessler & Kessler, Attorneys for Appellants, 9 Clinton Street, Newark 2, N. J. Received & Filed Nov. 29, 1944. William P. Rowland, Clerk.

[fol. 151] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8780

DORIS DUKE CROMWELL, Individually and as Trustee of the Duke Endowment, Plaintiff-Appellee,

vs.

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, NEW JERSEY, and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, Appellants

And afterwards, to wit, the 4th day of December, 1944, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on Appellants' Motion to Limit Record on Appeal before the Honorable Herbert F. Goodrich and Honorable Gerald McLaughlin, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

[fol. 152] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8780

DORIS DUKE CROMWELL, Individually and as Trustee, Plaintiff-Appellee,

vs.

TOWNSHIP OF HILLSBOROUGH, etc., et al., Defendants-Appellants

Appeal from the District Court of the United States for the District of New Jersey

And now, to-wit: this 14th day of February, A. D. 1945, it is ordered that Hon. John J. Parker, U. S. Circuit Judge, for the Fourth Circuit, and Hon. William H. Kirkpatrick, District Judge, for the Eastern District of Pennsylvania, be, and they are hereby assigned to sit in above case in order to make a full court.

Goodrich, Circuit Judge.

Endorsements: Order Assigning Hon. John J. Parker and Hon. William H. Kirkpatrick for Argument. Received and Filed Feb. 14, 1945. William P. Rowland, Clerk.

[fol. 153] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8780

DORIS DUKE CROMWELL, Individually and as Trustee of the Duke Endowment, Plaintiff-Appellee,

vs.

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, NEW JERSEY, and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, Appellants

And afterwards, to wit, the 14th day of February, 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John J. Parker and Honorable Herbert F. Goodrich, Circuit Judges, and Honorable William H. Kirkpatrick, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 9th day of May, 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 154] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8780

DORIS DUKE CROMWELL, Individually and as Trustee of the Duke Endowment,

v.

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, Appellants

Appeal from Judgment of the United States District Court for the District of New Jersey

Before Parker and Goodrich, Circuit Judges, and Kirkpatrick, District Judge

OPINION OF THE COURT—Filed May 9, 1945

By GOODRICH, Circuit Judge:

The plaintiff in this case brought an action for declaratory judgment under the statute (28 U. S. C. A. § 400) seeking

a declaration that four personal property tax assessments levied by the Somerset County Board of Taxation against the plaintiff individually and as trustee for the Duke Endowment are null and void. The litigation terminated in the District Court with the entry of a summary judgment in the plaintiff's favor and the defendants appeal.

The first ground for complaint on the part of the defendants is that the District Court was without jurisdiction to entertain the suit under the Declaratory Judgment Act. We do not doubt that federal courts are not to entertain suits under this statute for the sole purpose of obtaining [fol. 155] a determination of the validity of a state tax assessment where federal rights are fully protected by proceedings in the state courts. Great Lakes Dredge & Dock Co. et al. v. Huffman, 319 U. S. 293 (1943) is not only authority for the general proposition but gives appropriate caution to federal courts on the question of even indirect interference with the regular tax procedure of the states. But that decision did not hold that declaratory judgment procedure was unavailable where a federal right was threatened and where there was not an adequate remedy available within the state machinery.

The federal right involved is set out in Sioux City Bridge Co. v. Dakota County, 260 U. S. 441 (1923). It was there held that intentional and arbitrary assessment of one owner for taxation at its true value, in accordance with the state constitution and laws, while other like property is systematically assessed much lower, is a violation of the equal protection of the laws. This proposition has been reiterated in Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pennsylvania, 284 U. S. 23 (1931) and in Iowa-Des Moines National Bank v. Bennett, Chairman et al., 284 U. S. 239 (1931).

New Jersey makes provision for taxpayers who consider their legal rights to have been infringed by acts of taxing authorities. There is an appeal provided to the State Board of Tax Appeals, Borough of Oradell v. State Board of Tax Appeals, 125 N. J. L. 37, 13 A. (2d) 479 (1940). Procedure on certiorari may be invoked to review the Board's decision. Town of Kearney v. State Board of Taxes and Assessment et al., 103 N. J. L. 26, 135 Atl. 61 (1926). There is appeal to the Court of Errors and Appeals. General Motors Corporation v. State Board of Tax Appeals et al., 125 N. J. L. 574, 16 A. (2d) 632 (1932).

But when one turns to the New Jersey decisions upon the point covered in the Supreme Court cases above cited to compare the local rule of law, there is found this authoritative statement by Gummere, C. J. in Royal Mfg. Co. v. [fol. 156] Board of Equalization of Taxes of New Jersey, 78 N. J. L. 337, 74 Atl. 525, 526 (1909): "The action of the taxing authorities in assessing other property in the same taxing district at less than its true value afforded no reason for reducing the assessment upon the prosecutor's property to less than its true value; for the Constitution requires that property shall be assessed for taxation according to its true value, and a reduction below true value would be a violation of that constitutional provision." This rule is reiterated in other decisions. See State (Maxson et al., Prosecutors) v. Segoine, Collector, 53 N. J. L. 339, 21 Atl. 852 (1891), aff'd 54 N. J. L. 212, 25 Atl. 963 (1891); State, Wharton, Prosecutor v. A. E. Koster, Collector of Washington Township, Burlington County, 38 N. J. L. 308 (1876). In the latest case on the subject the court said: "It is the established law of this state that the fact that other property in a taxing district is assessed for valuation at less than its true value affords no ground for reducing the assessment placed upon the property of a complaining taxpayer below the true value thereof. * * * The petitioners concede this to be true, but contend that the rule to the contrary, as announced in the cases of which Sioux City Bridge Co. v. Dakota County * * * is typical, should be followed * * *. A substantially like contention was made and denied by this court * * *. The law, on this point, is also settled and controlling." Lehigh Valley R. Co. of New Jersey v. State Board of Taxes and Appeals et al., 12 N. J. Misc. 673, 174 Atl. 359 (1934).

The appellants contend that Central R. Co. of New Jersey v. State Tax Department et al., 112 N. J. L. 5, 169 Atl. 489 (1933), cert. den. 293 U. S. 568 (1934) has established the state law to the contrary and that the subsequent decision just quoted from must be disregarded as evidence of state law. We disagree. It is true that the court in the Central Railroad decision referred to the Sioux City Bridge case in that opinion citing it for the proposition that undervaluation must be established as an adopted practice. What [fol. 157] the court decided, however, was that the testimony offered in the particular litigation could not justify a finding of organized effort on the part of local assessors to assess

local property at less than true value. The same judge who wrote the opinion in this case also wrote the opinion in the Lehigh Valley case cited above. It is quite evident from the language used by him and his failure even to cite his earlier opinion that he did not think that the decision in the Central R. Co. case had overruled earlier decisions and changed the state law. We conclude that the view of the New Jersey courts upon the point is still that set out in the quotation from Mr. Chief Justice Gummere and the conflict between state law and federal right is still that which appears in the discussion of this court in Central R. Co. of New Jersey v. Martin, State Tax Com'r. et al., 65 F. (2d) 613 (C. C. A. 3, 1933).

The plaintiff's complaint alleged facts which showed a violation of the right set out by the Supreme Court in the Sioux City Bridge case. Appeal to the state courts, as shown in the state decisions cited, shows that such appeal would be unavailing to protect a constitutional right. Under those circumstances, the state procedure is not speedy, efficient or adequate. Union Pacific Railroad Company v. Board of County Commissioners of the County of Weld, State of Colorado, et al., 247 U. S. 282 (1918); Dawson, Attorney General of the State of Kentucky et al., v. Kentucky Distilleries & Warehouse Company, 255 U. S. 288 (1921). We conclude that the jurisdiction of the federal court in a declaratory judgment suit was properly invoked. See Spector Motor Service v. McLaughlin, Tax Commissioner, — U. S. —, 65 Sup. Ct. Reporter 152 (1944).

The point upon which the plaintiff won, in the District Court, was not the constitutional question, but that of the invalidity of the assessment under New Jersey law. This is shown in the plaintiff's motion for judgment and the opinion of the court in granting it. Since the foundation for federal jurisdiction existed, however, that jurisdiction [fol. 158] continued for the settlement of the controversy "even though [the court] * * * decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." Siler et al. v. Louisville & Nashville Railroad Company, 213 U. S. 175, 191 (1909); Greene, Auditor et al., Constituting The Board of Valuation and Assessment for the State of Kentucky et al., v. Louisville & Interurban Railroad Company, 244 U. S. 499 (1917); Chicago Great Western Railway Company v. Kendall, Gover-

nor of the State of Iowa, et al., 266 U. S. 94 (1924); Hurn et al. v. Ourster et al., 289 U. S. 238 (1933).

As already said, the decision in favor of the plaintiff was given, not on the constitutional ground of discrimination, but on the invalidity of the assessment under the law of New Jersey. A short statement of the formal setting of this portion of the case is relevant.

The complaint alleges that prior to October 1, 1940, plaintiff "deliberately and intentionally * * * established her residence and domicile in * * * [the] Territory of Hawaii * * *"; that on November 7, 1940, while residing there, defendant tax assessor of the Township of Hillsborough, in the County of Somerset, State of New Jersey, wrote her a letter directed to her at Duke Farms, Hillsborough Township, asking her to give a true account of her personalty as of October, 1940, for the purpose of fixing a proper assessment. On December 4, 1940, her attorney acknowledged receipt of the letter on her behalf stating she was not taxable in the Township with respect to personalty as she was not a resident of New Jersey.

On June 26, 1941, as a result of the application of one Horner, a resident and taxpayer and the collector of taxes of Hillsborough Township, the Somerset County Board of Taxation adopted a resolution that plaintiff was a resident of Hillsborough Township on October 1, 1939, and that taxable intangible personalty owned by her on that date and omitted from assessment for the year 1940 be assessed [fol. 159] against her in the sum of $60,054,424. A like resolution was adopted for intangible personalty owned by her on October 1, 1940, which had been omitted for 1941.

Resolutions were also adopted against plaintiff as trustee of the Duke Endowment for $161,886,014 omitted from assessment for 1940 and 1941. Certified copies of the resolutions and schedules annexed thereto were mailed to plaintiff at her home in Hillsborough Township, June 27, 1941, when she was advised that the next regular meeting would be held July 14, 1941. She did not appear but instituted suit on that day.

The assessments were made pursuant to 54:3-20 of the Revised Statutes of New Jersey, 1937, N. J. S. A. 54:3-20, which provides:

"The county board of taxation shall, by resolution, cause to be entered upon the tax duplicate a proper assessment

against any property omitted by the assessor. The board shall then give immediate notice of such entry and of the time and place of its next meeting to the owner of the property affected, and furnish a copy of the entry to the clerk or collector of the taxing district, who shall enter it on his tax list."

Following in the same section, and with no paragraph break, it is provided, "On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining, and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing * * *. Such proceedings may be brought within one year from the date when taxes on real property become a lien."

54:4-55 of the Statutes provides: "The county board of taxation shall, on or before April first in each year, cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes assessed, to be delivered [fol. 160] to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record."

If the assessments here were made under the first above quoted procedure, R. S. 1937—54:4-55, N. J. S. A. 54:4-55, which requires all revisions of tax lists to be made on or before April first in each year, would seem to invalidate the assessments since they were made in June. If made under the second above quoted procedure requiring five days' written notice and a hearing, they were likewise erroneously made as the Board did not conform to the specified requirements.

Appellants urge, however, that under R. S. 1937—54:4-58, N. J. S. A. 54:4-58, and 54:4-59, N. J. S. A. 54:4-59[1] (the

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[1] "54:4-58. Tax, assessment or water rate not set aside for irregularities or illegality.

No tax, assessment or water rate imposed or levied in this state shall be set aside or reversed in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying or levying any such tax, assessment or water rate, or in the proceeding for its col-

remedial statutes) irregularities in proceedings will not avoid the payment of taxes if in fact they are owed. Conover v. Honce, 46 N. J. L. 347 (1884); State ex rel. Saunders v. Morris, Collector, etc., 48 N. J. L. 99, 2 Atl. 666 (1886); Muscanetcong Iron Works v. Netcong et al., 90 N. J. L. 58, 99 Atl. 914 (1917); Manistee Iron Works Co. v. Raritan T. P. et al., 12 N. J. Misc. 143, 170 Atl. 39 (1934); Ridgewood Elks Holding Corporation v. Village of Ridgewood et al., 127 N. J. L. 295, 22 A. (2d) 266 (1941).

But in the latest New Jersey decision upon the subject, Duke Power Co. v. State Board of Tax Appeals et al., 129 N. J. L. 449, 30 A. (2d) 416 (1943), aff'd 131 N. J. L. 275, 36 A. (2d) 201 (1944), it was stated that the remedial [fol. 161] statutes have not been a substitute for proper assessment, the court adding that they have been applied "only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner. Musconetcong Iron Works v. Borough of Netcong, 90 N. J. L. 58, 99 A. 914; Manistee Iron Works v. Raritan, 12 N. J. Misc. 143, 170 A. 39. But they do not apply where the statute for the addition of property omitted from the assessment is not complied with. Mitsch v. Riverside, 86 N. J. L. 603, 92 A. 436; Shillingsburg v. Greenwich, 83 N. J. L. 129, 83 A. 644."

The appellants attack the quoted statement as dictum pointing out that it was proved that the property sought to be taxed was found by the court not to be subject to taxation in New Jersey. Such was one ground for the

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lection if the person against whom or the property upon which it is assessed or laid is, in fact, liable to taxation, assessment or imposition of the water rate, in respect to the purposes for which the tax, assessment or rate is levied, assessed or laid."

"54:4-59. Court to amend and fix amount due.

The court in which any action, suit or proceeding, is or shall be pending to review any such tax, assessment or water rate shall amend all irregularities, errors or defects, and may if necessary ascertain and determine the sum for which the person or property was legally liable and by order or decree fix the amount thereof. The sum so fixed shall be the amount of tax, assessment or water rate for which the person or property shall be liable."

decision, no doubt. But the decision was squarely rested on both the non-taxability of the property and the erroneous nature of the procedure. We see not the slightest reason for supposing that the court did not mean just what it said when it rested its decision on both points.

There was filed, in the District Court, a supporting affidavit executed by counsel for the plaintiff. The appellant criticizes the document for lack of conformity to Federal Rules of Civil Procedure 56 (e), 28 U. S. C. A. foll. § 723c. Portions of the affidavit do not conform to the rule. But disregarding them, there is still sufficient in the "entire record" upon which the District Judge based his decision, to bring the case within the holding of the Court of Errors and Appeals in the Duke Power case and to support the decision reached.

The judgment of the District Court is affirmed.

A true Copy:

Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 162] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8780

DORIS DUKE CROMWELL, Individually and as Trustee of the Dike Endowment,

vs.

TOWNSHIP OF HILLSBOROUGH, Somerset County, N. J., and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, Appellants

Present: Parker and Goodrich, Circuit Judges, and Kirkpatrick, District Judge

On appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel. On considera-

tion whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

By the Court, Goodrich, Circuit Judge.

May 9, 1945.

Endorsements: Order Affirming Judgment. Received and Filed May 9, 1945. William P. Rowland, Clerk.

[fol. 163] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendices to the Briefs of Appellants and Appellee, as constituting the portions of the record before this court at argument; and proceedings in this court, in the case of Doris Duke Cromwell, etc. vs. Township of Hillsborough, et al., No. 8780, on file, and now remaining among the ecords of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 30th day of July in the year of our Lord one thousand nine hundred and forty-five, and of the Independence of the United States the one hundred and seventieth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 164] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy, Mr. Justice Jackson, and Mr. Justice Burton took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
AUG 8 1945
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM—1945

No. 305

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough,

Petitioners,

—*vs.*—

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

SAMUEL I. KESSLER,
Counsel for Petitioners,
9 Clinton Street,
Newark 2 N. J.

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Supreme Court of the United States

OCTOBER TERM—1945

No.

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough, Petitioners, —*vs.*— DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment, Respondent.	Petition for Certiorari to the U. S. Circuit Court of Appeals for the Third Circuit and Brief in support thereof.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Township of Hillsborough, Somerset County, New Jersey, and Christopher G. Horner its Collector of Taxes, the petitioners herein, respectfully pray a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Third Circuit affirming a judgment of the United States District Court for the District of New Jersey denying petitioners' motion to dismiss the complaint and granting plaintiff's motion for a summary judgment. The complaint was brought under the Federal Declaratory Judgment Act and the judgment declares said tax assessments against the respondent to be null and void.

Statement of the Case.

The proceedings pertinent to this application are as follows:

On July 14, 1941, the respondent instituted her action individually and as trustee of the Duke Endowment against the Township of Hillsborough, Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting the Somerset County Board of Taxation, and Charles V. N. Davis, Tax Assessor of the Township.

The action was instituted solely and by virtue of the Federal Declaratory Judgment Act. U. S. C. A. Title 28, Sec. 400 (p. 7a to p. 9a). The relief sought was a declaration by the Court that four intangible personal property tax assessments for the year 1940 and 1941 levied by the Somerset County Board of Taxation against the respondent individually and as trustee of the Duke Endowment, a common law trust, be held null and void (p. 35a).

After issue was joined the Trial Court on motion of the respondent entered a summary judgment in favor of the respondent and held that the assessments were null and void. The assumption of jurisdiction by the Court and the entry of judgment and affirmance on appeal results in this application (p. 114a to p. 116a).

The complaint alleges that the respondent is a resident of the Territory of Hawaii and that on November 7, 1940, while respondent was at her home in the Territory of Hawaii the defendant Davis, as tax assessor of the Township of Hillsborough, wrote her a letter directed to her at Duke Farms, Hillsborough Township, asking that respondent give a true account of her personal property, money, effects and credits, as of the first day of October, 1940, so that the

assessor could fix a proper assessment of all her personal property taxable in Hillsborough Township.

On December 4, 1940, Freeman J. Daniels, Esq., an attorney representing the respondent, wrote to defendant Davis acknowledging receipt of the letter on her behalf and stating that the respondent was not further taxable in the Township with respect to any personal property because on that date she was not a resident of the State of New Jersey.

It is alleged that prior to October 1, 1940, respondent ceased to be a resident of the Township of Hillsborough and had established her residence in the Territory of Hawaii. It further alleged that an assessment had been made against the respondent individually on account of her personal property for the taxing year 1941.

On June 26, 1941, the said defendants, Lifgren, Davenport and Soriano, sitting as the Somerset County Board of Taxation, adopted a resolution which recited that after due inquiry and examination it determined that the respondent was on October 1, 1939, a resident of Hillsborough Township and that taxable intangible personal property owned by the respondent on October 1, 1939, was entirely omitted by the assessor of Hillsborough Township from the assessment of property of said Township for the taxing year 1940, and in its resolution assessed as omitted property against the respondent individually for the taxing year 1940 an assessment in the sum of $60,054,424, based upon intangible personal property owned by the respondent on October 1, 1939.

The resolution recites that the assessment was entered as a result of the application of the petitioner Horner, a

resident and taxpayer and the collector of taxes of the defendant Hillsborough Township, and that his application was supported by proof (p. 37a to p. 39a).

On the same date a similar resolution was adopted by the said Somerset County Board of Taxation entering an assessment against the respondent individually in the same amount for intangible personal property owned by her on October 1, 1940, and which was omitted from the assessment by the assessor of Hillsborough Township for the taxing year 1941 (p. 39a to p. 41a).

On the same date another resolution was adopted by the said Somerset County Board of Taxation against the respondent as trustee of the Duke Endowment assessing a tax against her as trustee of the Duke Endowment for intangible personal property owned by the said Duke Endowment on October 1, 1939, and omitted by the assessor of Hillsborough Township from the assessment of property for the taxing year 1940. The amount of the assessment based upon the personal intangible property owned by said Duke Endowment was in the sum of $161,886,014 (p. 43a to p. 45a).

On the same date another resolution was adopted by the said Somerset County Board of Taxation against the respondent as trustee of the Duke Endowment for the intangible personal property owned by the said Duke Endowment on October 1, 1940, and omitted by the assessor of Hillsborough Township from the assessment of property for the taxing year 1941. The amount of the assessment was the same as in the first resolution against the Duke Endowment (p. 46a to p. 48a).

Certified copies of all the resolutions and schedules annexed thereto were mailed to the respondent at her home in

Hillsborough Township on June 27, 1941, and received there. She was advised at that time that the next regular meeting of the Tax Board would be held on July 14, 1941, at 10:30 A.M. at the Court House, Somerville, New Jersey (p. 16a, p. 36a, p. 42a). The respondent did not appear at this meeting but instituted the declaratory judgment action on that day.

It is alleged that the taxes assessed against the respondent individually were invalid because prior to October 1, 1940, she was not a resident of the Township of Hillsborough; that the Somerset County Board of Taxation did not have any power or jurisdiction to make the assessment, that the respondent, individually and as trustee, was unjustly, arbitrarily and fraudulently discriminated against in the assessment of taxes and that her constitutional rights had been infringed. She denied that she owned the property assessed individually or as trustee of the Duke Endowment and alleged that she did not receive any notice of the assessment prior to its entry. She avers that the Duke Endowment is a common law trust created by James B. Duke on December 11, 1924, and is devoted to charitable purposes, and that the intangible personal property of the Duke Endowment was in the custody of its treasurer, a resident of the State of New York.

The respondent prayed that the Court by virtue of the Federal Declaratory Judgment Act declare the assessments and resolutions adopted by the Somerset County Board of Taxation be held wholly null and void (p. 7a to p. 35a).

On September 8, 1941, an order was entered by the Court dismissing the suit as to defendants, Lifgren, Davenport and Soriano, constituting the Somerset County Board of Taxation.

The answer filed by the petitioners denied that the respondent was not a resident of the Township of Hillsborough and denied that she had paid any tax for the years 1940 and 1941 on her personal intangible property and denied that the Duke Endowment had paid any tax at any time to Hillsborough Township. The answer also denied that the assessments were entered contrary to law and in violation of the constitutional rights of the respondent and denied all charges of fraud and intentional discrimination.

The answer averred that the Duke Endowment is a common law trust created and existing by virtue of the laws of the State of New Jersey and when created by James B. Duke he was a resident of Hillsborough Township and the situs of all of its personal intangible property was at all times in Hillsborough Township. The answer also avers and alleges that the taxes were assessed in accordance with the Statutes of the State of New Jersey and that legal notice was given to the respondent of the date of the meeting following the enactment of the resolutions at which time she had an opportunity to be heard in respect to the assessments. It further alleges that the respondent individually and as trustee had concealed the assets which were taxable and had refused to give any information relative thereto.

The answer specifically challenged the jurisdiction of the Court on the ground that the suit was not within the Federal Declaratory Judgment Act, that it was in effect the enjoining of the collection of a state tax and that the plaintiff had a plain, speedy, efficient and complete remedy in the administrative bodies and courts of the State of New Jersey (p. 50a to p. 70a).

On November 3, 1941, petitioners and the remaining defendant moved to dismiss the complaint on the ground that

the Court was without jurisdiction under the Federal Declaratory Judgment Act, that the respondent had a speedy, adequate and efficient remedy in administrative bodies and courts of the State of New Jersey, that the purpose of the action was in effect to enjoin, suspend or restrain the assessment, levy or collection of a tax imposed by the laws of the State of New Jersey contrary to the provisions of U. S. C. A. 28, Sec. 41, Subdiv. 1, and that the respondent failed to exhaust her remedies in the administrative bodies and the courts of the State of New Jersey, and that the members of the Somerset County Board of Taxation were necessary and indispensible parties to the action (p. 71a to p. 73a).

On July 30, 1942, the Trial Judge filed his opinion denying the motion to dismiss on the ground that the Court did have jurisdiction within the Federal Declaratory Judgment Act, that the members of the Tax Board were not necessary parties, that the proceeding was not one to enjoin, suspend or restrain the collection of a tax and that the respondent did not have an adequate remedy in the administrative bodies and the courts of the State of New Jersey would not give adequate relief to redress intentional discrimination (p. 75a to p. 80a).

On August 10, 1942, an order was entered denying the petitioners' motion to dismiss (p. 80a to p. 84a).

On March 27, 1944, the respondent filed a motion for summary judgment against the petitioners based on an affidavit of Shelton Pitney, Esq., and by reference therein to depositions taken by the respondent from various witnesses which had been filed with the Clerk of the Court but which had not at any time been offered as evidence (p. 82a to p. 108a).

A motion at the same time was made to dismiss the complaint by the petitioners on the ground that the Court did not have jurisdiction, and that the Court in its discretion should not entertain jurisdiction on the ground that the respondent had a plain, adequate and complete remedy in the administrative bodies and the courts of the State of New Jersey, and as to the defendant Davis that he was not a necessary party (p. 109a to p. 110a).

On July 14, 1944, the Trial Judge filed his opinion granting the motion as to the defendant Davis and denied the petitioners' motion to dismiss the complaint and entered summary judgment in favor of the respondent and against the petitioners. The Court held the taxes to be invalid and based his decision on the affidavit of Shelton Pitney, Esq., and the decision of the New Jersey courts in *Duke Power Company* v. *State Board of Tax Appeals,* 129 N. J. L. 449, 30 Atl. (2d) 416, affirmed 131 N. J. L. 275, 36 Atl. (2d) 201.

The Court below held that the respondent had not had proper notice, or a hearing on the assessments, and that the assessments were made at a time when the Tax Board did not have jurisdiction.

The Court recognized the fact that there was an adequate state administrative and legal remedy because his decision was based on a ruling of the New Jersey courts which gave complete and adequate relief to the taxpayer, but held that the Court would still retain jurisdiction and decide the case on state law because the Court had originally taken jurisdiction on the ground of discrimination (p. 112a to p. 113a).

On August 7, 1944, the Court entered its summary judgment in favor of the respondent and against the petitioners (p. 115a to p. 116a). Upon appeal, the Circuit Court of

Appeals for the 3rd Circuit affirmed this judgment. The petitioners now seek certiorari to review that decision.

Jurisdiction.

The jurisdiction of this court to entertain and grant this petition is provided by Section 347 of Title 28 in the United States Code. Definitely involved is a decision of the Circuit Court of Appeals upon an important question of local law drawing into question the validity of the statutes and laws of the State of New Jersey as being repugnant to the Constitution and laws of the United States.

The decision of the District Court affirmed by the Circuit Court of Appeals finds that "the existing State law is in conflict with the Federal Constitution". The Circuit Court of Appeals held that the State court remedies were "unavailing to protect the constitutional rights" of the respondent.

The decision in the Circuit Court of Appeals is likewise in conflict with the rule established by this court in *Great Lakes Dredge and Dock Company, et al. v. Huffman*, 319 U. S. 293 (1943), holding that Federal Courts are not to entertain suits under this statute for the sole purpose of obtaining a determination of the validity of a state tax assessment and cautioning Federal Courts on the question of even indirectly interfering with the regular tax procedure of the State.

The matter is of the greatest importance and gravity since the decision of the Circuit Court of Appeals sets at naught the effort of the State and its municipality, a petitioner herein, to enforce the collection of a tax assessed and due under the Laws of the State of New Jersey.

Opinions of the Courts Below.

The opinion of the Honorable Guy L. Fake, Judge of the United States District Court for the District of New Jersey, is contained in the appendix at page 111a and at 56 F. Supp. 41. His opinion was rendered on three motions. The first was a motion for summary judgment declaring the assessments entered herein to be null and void. The court held that the resolutions adopted by the Somerset County Board of Taxation and the assessments made pursuant thereto, were without notice to the respondent, contrary to Section 54:3-20 of the Revised Statutes of New Jersey as construed in *Duke Power Company* v. *State Board of Tax Appeals*, 129 N. J. L. 449, affirmed 131 N. J. L. 275, and that the resolutions and subsequent proceedings thereon were therefor null and void.

The second motion was made by the petitioners to dismiss the complaint on the ground that the court had no jurisdiction, that the court in its discretion should have refused to entertain jurisdiction, and third, that the respondent had an adequate remedy in the State Courts and administrative bodies. The court denied this motion holding that the allegations of discrimination in the complaint gave the Federal Court ground for jurisdiction inasmuch as the existing state law on this point is in conflict with the Federal Constitution. The court held further that even though an adequate remedy might exist in the courts of the State of New Jersey, it would retain jurisdiction on the ground of discrimination and therefore denied the motion. The third motion is not here involved. It granted a judgment in favor of the defendant, Charles Davis, tax assessor. The opinion of the Circuit Court of Appeals filed May 9, 1945 held that the District Court had jurisdiction to entertain the complaint on the ground that there was not an

adequate remedy available within the state machinery. It was further held that the relief afforded by the courts of New Jersey on the question of discriminatory taxation was in conflict with the Federal right involved as set out in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441 (1923). The Circuit Court of Appeals did not agree with the contention urged by petitioners herein that the decision of the New Jersey courts in *Central Railroad Co.* v. *State Tax Department*, 112 N. J. L. 5 (cert. den. 298 U. S. 568) has established the State Law to the contrary and that the State Law is now in harmony with the Federal rule set forth in the *Sioux City* case, *supra*.

The Circuit Court of Appeals likewise held that the assessments herein were not made in accordance with the Statutes of the State of New Jersey and further held that the remedial statutes of New Jersey found in Revised Statutes 54:4-58, 59 to the effect that irregularities in the proceedings or illegality in assessing or levying any tax will not avoid the payment of taxes if in fact they are due and owing, did not apply to the situation at bar.

The Questions Presented.

The questions presented by this petition are:

1. Did the Trial Court err in assuming jurisdiction of the respondent's complaint and the alleged cause of action set forth therein under the Declaratory Judgment Act?

2. Did the District Court have jurisdiction of the respondent's complaint and the alleged cause of action set forth therein?

3. Did the District Court err in granting a summary judgment in favor of the respondent and against the petitioners?

Reasons Relied on for Allowance of the Writ.

1. The Circuit Court of Appeals disregarded the rule expressed by this court in *Great Lakes Dredge and Dock Co., et al.* v. *Huffman,* 319 U. S. 293, that Federal Courts ought not to entertain suits under this statute for the sole purpose of obtaining a determination of the validity of a State Tax assessment.

2. The Circuit Court of Appeals disregarded the provisions of Section 41 (1) of Title 28 U. S. Code, which provides that "no District Court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of said state", in that the Bill of Complaint herein was a proceeding to restrain the collection of the tax imposed by the petitioner against the respondent.

3. The Circuit Court of Appeals disregarded the decision of the New Jersey Court of Errors and Appeals in *Central Railroad Company* v. *State Tax Department,* 112 N. J. L. 5, which recognized the rule relating to intentional discrimination in the assessment of taxes as set forth by the United States Supreme Court in *Chicago C. W. Railroad* v. *Kendall,* 266 U. S. 94 and *Sioux City Bridge Co.* v. *Dakota County, supra,* and the Circuit Court of Appeals erred in holding that the courts of New Jersey do not afford a plain, speedy and efficient remedy to the respondent herein.

4. The Circuit Court of Appeals erred in holding that a plain, speedy and efficient remedy did not exist within the State of New Jersey in view of the decision in *Duke Power Co.* v. *State Board of Tax Appeals,* 129 N. J. L. 149.

affirmed 131 N. J. L. 275, in which case under facts almost identical with facts herewith presented, the courts of New Jersey did afford a complete and adequate remedy.

5. The Circuit Court of Appeals disregarded the provisions of the remedial statutes of the State of New Jersey contained in Revised Statutes 54:4-58, 59, that irregularities in procedure and illegality in assessing or levying taxes will not avoid the payment of taxes if in fact they are due and owing.

6. The Circuit Court of Appeals erred in holding that the District Court had jurisdiction to entertain the complaint herein on the ground of discrimination, whereas, in fact, no such discrimination was proved in this case and no hearing or trial upon the merits of said issue was ever had.

WHEREFORE, it is respectfully submitted that this Petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit be granted.

Dated: August 3, 1945.

TOWNSHIP OF HILLSBOROUGH,
SOMERSET COUNTY, N. J., and
CHRISTOPHER G. HORNER,
Collector of Taxes of the
Township of Hillsborough,
Petitioners.

BY SAMUEL I. KESSLER,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

I

The Trial Court erred in assuming jurisdiction of the respondent's complaint and the alleged cause of action set forth therein under the Declaratory Judgment Act.

It has been definitely settled by this Court, in *Great Lakes Dredge and Dock Company* v. *Huffman*, 319 U. S. 293, that the federal courts will not entertain a declaratory judgment suit instituted for the purpose of having the federal courts determine the invalidity of tax assessments, and this is so whether or not it is apparent to the Court that the tax is invalid. This Court held that the considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, applied to the use of the declaratory judgment procedure. An examination of that case will disclose that under the law set forth therein the Trial Court in the case at bar should not have assumed jurisdiction of the respondent's suit, but should have dismissed it.

In that case an action was instituted in the United States District Court for the Eastern District of Louisiana by the plaintiffs praying that the Court declare that a state law of Louisiana as applied to the plaintiffs and their employees was unconstitutional and void. The issue raised in that case was the applicability of the Louisiana State Unemployment Compensation Law to maritime employees.

The validity of the tax was upheld in the District Court and in the Circuit Court of Appeals and at no time did

either of those courts or the parties themselves raise the question of jurisdiction.

On granting a writ of certiorari this Court requested counsel "to discuss in their briefs and on oral argument the question of whether the declaratory judgment procedure can be appropriately used in this case where the complaint seeks a judgment against a state officer to prevent enforcement of a state statute."

There was not any allegation in the complaint in that case for any order to enjoin or restrain the taxing authorities but prayed for declaratory judgment as to the validity of the tax.

This Court held that the Trial Court in its discretion should not have entertained jurisdiction of a declaratory judgment suit to determine the validity or invalidity of a state tax and affirmed the dismissal of the Court below solely on the ground "that, in the appropriate exercise of the Court's discretion, relief by way of a declaratory judgment should have been denied without consideration of the merits."

In its opinion this Court said:

> "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. * * *"

> "For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional

cases, require a like restraint in the use of the declaratory judgment procedure."

Applying that law to the facts in the case at bar as they appear from the record, it is clear that the Court below erred in assuming jurisdiction of the respondent's declaratory judgment suit and in entering summary judgment.

As appears from the complaint filed in this action relief was sought solely under the Federal Declaratory Judgment Act and the prayer of the complaint is that the assessments be declared wholly invalid and void (p. 35a).

The taxes assessed against the respondent individually and as trustee of the Duke Endowment were levied by the Somerset County Board of Taxation. The tax assessed on intangible personal property is a state tax created by the statutes of the State of New Jersey. *Jersey City* v. *Martin*, 126 N. J. L. 353, 19, Atl. (2d) 40, N. J. Rev. St. 1937, 54:4-1.

There is no distinction between the object sought in the case at bar and in *Great Lakes Dredge and Dock Co.* v. *Huffman, supra.* In both instances declaratory judgments were sought as to the validity or invalidity of a state tax and for that reason that case is applicable here. As stated by this Court in that case:

"Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer—especially where the state, acting within its constitutional au-

thority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax. * * *"

There cannot be any question in the case at bar that the respondent had a plain, speedy and efficient remedy in the courts of the State of New Jersey if the taxes were illegally imposed. The Court below entered summary judgment against the petitioners based on the decision of the New Jersey Supreme Court as affirmed by the Court of Errors and Appeals, in *Duke Power Company* v. *State Board of Tax Appeals,* 129 N. J. L. 449, 30 Atl. (2d) 416, affirmed 131 N. J. L. 275, 36 Atl. (2d) 201. The Trial Judge took the position that the law of that case was applicable to the facts in the case at bar and entered summary judgment for that reason and gave the relief which he believed would have been given the plaintiff in the state court. He conceded that, therefore, it was apparent that there was an adequate state administrative and legal remedy, but retained jurisdiction notwithstanding this on the ground that there was no point in sending the issue to the state court when the federal court could and did retain jurisdiction on the ground of discrimination. This is erroneous because it is based on the assumption that the court had jurisdiction in the first instance. It is not necessary at this point to determine whether or not the Trial Judge's conclusions that *Duke Power Company* v. *State Board of Tax Appeals, supra,* is applicable and dispositive of the issues in the case at bar, for under *Great Lakes Dredge & Dock Co.* v. *Huffman, supra,* the correctness of the Trial Court's decision is immaterial if it lacked jurisdiction.

However, if the Trial Judge is wrong in concluding that the *Duke Power* case is conclusive of the issues here, the respondent at all times had a plain, speedy and efficient

remedy in the administrative bodies and in the courts of the State of New Jersey. It is not contended by the respondent that if she could establish that she was a non-resident at the time the tax was imposed, or that they were fraudulently imposed, or that the Tax Board did not have jurisdiction at the time it imposed the taxes, that she would not have any remedy in the courts of the State of New Jersey. Her claim has been, and the sole one on which the Trial Court claimed jurisdiction, that the courts of the State of New Jersey fail to provide an adequate remedy for a taxpayer against whom a tax has been assessed as the result of intentional discrimination.

The respondent, on the imposition of the taxes, had the right under N. J. R. S. 54:1-26, to call on the State Tax Commissioner for a reassessment of property on which the assessments had not been made in substantial compliance with the law. That statute provides:

> "When the commissioner has reason to believe that any property, including the property of railroad and canal companies, has been assessed at a rate lower than is consistent with the purpose of securing uniform and true valuation of property for the purpose of taxation, or that the assessment of property in a taxing district is not in substantial compliance with the law and that the interests of the public will be promoted by a reassessment of such property, he may, after due investigation, order or make a reassessment of any property undervalued or a reassessment of all the property in the taxing district."

She also had a right to appeal the assessments levied to the State Board of Tax Appeals where she would have had a trial *de novo* (Rev. St. 1937, 54:2-35). *City of Paterson* v.

Baker, 139 Atl. Rep. 604. If not satisfied with the review before the State Board of Tax Appeals she could have applied to the New Jersey Supreme Court for a writ of certiorari to review the amount of the tax, the jurisdiction of the County Board, the validity or invalidity of the assessment, and all of the alleged legal impediments to the tax set forth in the respondent's complaint. *Pope* v. *Borough of Red Bank,* 19 Atl. (2d) 208; *Oradell* v. *State Board of Tax Appeals,* 125 N. J. L. 37, 13 Atl. Rep. (2d) 479; Rev. Stat. 54:4-59.

If the respondent had followed her administrative remedy in the State courts as was done in the *Duke Power Company* v. *State Board of Tax Appeals, supra,* she could have set up there all of the claims set up in her declaratory judgment suit. In that action Duke Power Company contended, as one of its grounds of appeal, that it had been intentionally discriminated against in having the taxes levied against it. See opinion of *State Tax Board,* 26 Atl. Rep. (2d) 743, wherein it is stated:

> "The petition of appeal before this Board charges that the assessments in question are contrary to our taxing laws, discriminatory, and in violation of the federal constitution. No attempt was made to prove the charge of discrimination and we therefore do not consider it * * *."

The Supreme Court on certiorari has the power to review and determine questions of fact as well as those of law. *Pennsylvania R. Co.* v. *State Board of Taxes and Assessments,* 103 N. J. L. 28; 134 Atl. Rep. 722; *Town of Kearney* v. *State Board of Taxes and Assessments,* 103 N. J. L. 26, 135 Atl. Rep. 61; *Colonial Life Insurance Company* v. *State Board of Tax Appeals,* 126 N. J. L. 126, 18 Atl. Rep. (2d) 625.

If the respondent were dissatisfied with the findings of the New Jersey Supreme Court she could then appeal to the Court of Errors and Appeals. *General Motors Corp.* v. *State Board of Tax Appeals*, 125 N. J. L. 574, 16 Atl. (2d) 632.

If the respondent were still dissatisfied and believed that she was deprived of any constitutional right, she had a right to apply to this Court for a review of the State Court's adjudication.

In this case the respondent has not made any payment of the tax assessed, but if she had and the tax was held invalid or excessive, she could recover any such payment made in the event that it was not voluntarily returned by the taxing authorities. *Hahne Realty Corp.* v. *City of Newark*, 119 N. J. L. 12, 194 Atl. Rep. 191; *Francis Realty Co.* v. *City of Newark*, 16 N. J. Misc. Rep. 328, 199 Atl. Rep. 912.

Where a taxpayer has appealed to the State Board of Tax Appeals from the assessment against him and has paid to the collector of taxes such portion of the tax as he would be required to pay were his appeal sustained, the collector is excused from collecting the balance of the tax until the appeal is decided, and the Court of Chancery will enjoin the collection of any further amount until the appeal is decided. *Rice* v. *City of Newark*, 136 N. J. Eq. 53. The Supreme Court also has the power to stay the collection of the tax on the granting of a writ of certiorari. R. S. 1937, 54:5-10.

The Trial Court fell into error in assuming that the courts of New Jersey would not permit a taxpayer to establish intentional discrimination in the assessment of a tax against him and to have an appropriate remedy.

In *Central R. Co.* v. *Martin, State Tax Commissioner,* 112 N. J. L. 5, 169 Atl. Rep. 489, certiorari denied 293 U. S. 568, 79 L. Ed. 667, 55 Sup. Ct. 79, the Court of Errors and Appeals of this State recognized the rule relating to intentional discrimination in the assessment of taxes as set forth by this Court in *Chicago C. W. Ry.* v. *Kendall,* 266 U. S. 94, and *Sioux City Bridge Co.* v. *Dakota Co.,* 260 U. S. 441.

In that case the plaintiff sought a review of main-stem, tangible personal property and franchise taxes for the year 1931. The railroad contended that the tax was excessive and that the tax unlawfully discriminated against the railroads and denied them the equal protection of the laws in violation of the 14th amendment; that the tax deprived the railroad of its property without due process of law in violation of the 14th amendment; that under the United States Supreme Court decisions the Courts should either reduce the tax or remit the matter to the State Tax Department with instructions to do it. At the time of this appeal there was not any state statute which authorized the railroads to specifically raise the question of illegal discrimination before the Tax Board or before the Supreme Court. There was in effect at that time Chapter 100 of the Laws of 1931, which, in Section 10, provided that the State Tax Board

> "is hereby empowered and charged with the duty to review, hear and determine all appeals by any person, firm, or corporation, taxing district, municipality, or county, aggrieved by any act, proceeding, ruling, decision or determination of the State Tax Department or of the State Tax Commissioner, and to make reasonable rules regulating the manner, form, time, terms and conditions of such appeals, and to make such orders upon the final determination of such appeals as

will effectuate such final determination according to law."

The general language contained therein is not dissimilar from the language set forth in N. J. R. S. 54:2-35 which permits this respondent to appeal to the State Board of Tax Appeals on any action or determination of the County Board of Taxation.

It appears from page 9 of the opinion in that case that the railroad did present evidence before the State Tax Board in an effort to establish that there was intentional discrimination on the part of the taxing authorities which violated the railroad's constitutional right. The State Tax Board found that the railroad had failed to establish that there was intentional discrimination on the part of the taxing authorities. A writ of certiorari was allowed by the New Jersey Supreme Court and in that Court the railroad was permitted to take depositions. It there took further testimony in an effort to establish intentional discrimination on the part of the taxing authorities. The New Jersey Supreme Court refused to review the appeal on jurisdictional grounds (109 N. J. L. 395). The Court of Errors and Appeals did review all of the evidence produced by the railroad before the Tax Board and before the Supreme Court on the question of discrimination and found that the proofs failed to establish the claim that the railroad's property was valued at a higher level than that of local assessable property generally, and that the proofs failed to establish that an organized effort was made by the local tax assessors to assess, systematically or intentionally, local property at less than its true value. That Court in its opinion, at page 14, said:

"Appellant undertook to prove an organized and determined effort to undervalue property other than

railroad property, systematically or intentionally. It must establish this undertaking as an adopted practice. *Chicago C. W. Ry.* v. *Kendall*, 266 U. S. 94; *Sioux City Bridge Co.* v. *Dakota Co.*, 260 Id. 441; *So. Ry. Co.* v. *Watts*, Ibid., 519. * * * "

"Appellant failed to sustain the burden of proof that the 'average rate of taxation' was not computed by use of true values.

As already pointed out we have fully considered the proofs submitted to the State Tax Board of Tax Appeals as well as the proofs submitted on the rule to take depositions allowed in this cause."

It might be well to point out that when *Central Railroad Co.* v. *Martin, supra,* was pending in the Court of Errors and Appeals, the Legislature of New Jersey amended the Railroad Tax Act and provided specifically that if there was a claim of illegal discrimination in the assessment of property under that Act, a hearing could be had on such question before the State Board of Tax Appeals (Chap. 305, laws of 1933). This Statute became effective June 31, 1933, and was not considered in the decision in *Central Railroad* v. *Martin, supra.* That case was argued May 22, 1933, and decided December 7, 1933, and was to review taxes for the year 1931. The hearings in all of the administrative bodies and the Courts had been completed before the enactment of the Statute referred to and, therefore, did not have any relevancy nor was it considered by the Court in its opinion.

A reading of the opinion in *Central Railroad* v. *Martin, supra,* shows without question that the taxpayer did offer testimony both before the State Board of Tax Appeals and

additional testimony in the Supreme Court after the granting of the writ of certiorari to prove alleged intentional discrimination on the part of the taxing authorities. The Court of Errors and Appeals considered this testimony and cited the law as laid down by the United States Supreme Court relating to intentional discrimination on the part of the taxing authorities in levying assessments, and found that the evidence produced did not establish intentional discrimination.

The Trial Judge in his opinion on the first motion by the petitioners to dismiss, in discussing this case, assumes that if the Court had found that there was intentional discrimination that notwithstanding this it would not have granted any relief to the taxpayer, and that it appeared it was not the intent of the Court of Errors and Appeals to grant any relief to the taxpayer because subsequently a branch of the Supreme Court in *Lehigh Valley R. R. Co.* v. *State Board of Tax Appeals*, 12 N. J. Misc. Rep. 673, 174 Atl. Rep. 359, held that the State Tax Board did not err in refusing to hear testimony of the taxpayer touching discrimination.

At the outset it must be kept in mind that discrimination alone does not violate any constitutional right of the taxpayer. It must be an intentional or systematic discrimination.

It does not appear from *Lehigh Valley R. R. Co.* v. *State Board of Tax Appeals, supra*, whether or not there was any offer to prove intentional discrimination. Be that as it may, the decision of the Court of Errors and Appeals in *Central R. Co.* v. *Martin, supra*, stands unreversed and is the law of the State of New Jersey, and, of course, it could not be reversed by the subordinate New Jersey Supreme Court or any part thereof. Furthermore, under *Erie R. Co.* v.

Tompkins, 304 U. S. 64, the Trial Judge was duty bound to accept the state law as determined by the highest court of the state. This Court was satisfied with the manner in which the constitutional rights of the taxpayer were protected in that case as it refused to review the proceedings. Whatever may have been the law in New Jersey prior to *Central R. Co.* v. *Martin*, *supra*, is of no force now in view of that decision which stands unreversed.

The Circuit Court of Appeals for the Eighth Circuit has recently applied the rule laid down in the *Great Lakes* v. *Huffman*, *supra*, case in *Miller, et al.* v. *City of Greenville, Miss., et al.*, 138 Fed. (2d) 712. In that action, the City of Greenville, a Mississippi corporation, and Union Planters National Bank & Trust Co., a national bank in Tennessee, as trustee under a trust indenture, brought a declaratory judgment action against the Arkansas Corporation Commission and its individual members, and against tax officials of Chicot County, Arkansas, for a declaratory judgment and prayed that the Court declare that the portion of a bridge over the Mississippi River which was in the State of Arkansas and owned by the City of Greenville, was exempt from taxation by the Arkansas state authorities. The United States District Court for the Eastern District of Arkansas granted the plaintiffs' prayer and entered a declaratory judgment in its favor. The District Court's judgment was entered October 28, 1942, prior to the opinion of the United States Supreme Court in the *Great Lakes* case. The Circuit Court of Appeals for the Eighth Circuit dismissed the declaratory judgment action on the basis of the mandate laid down by this Court in the *Great Lakes* case.

It is well established that the Federal courts exercise an appropriate reluctance to interfere with the fiscal affairs

of the state and it is the accepted practice that the federal courts relinquish their jurisdiction in favor of the state courts in respect to such matters if the full rights of the plaintiff can be there preserved without impairment. *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276; *Matthews* v. *Rogers*, 284 U. S. 521; *Pennsylvania* v. *Williams*, 294 U. S. 176.

And this is so even though a plaintiff charges a violation of rights guaranteed to him by the due process and equalization clauses of the 14th Amendment. It is accepted that the state courts bear equal responsibility with federal courts to guard and protect the rights secured by the Constitution of the United States. *U. S.* v. *Bank of New York*, 296 U. S. 463.

We, therefore, respectfully submit that the respondent's complaint should have been dismissed by the Court below under the authority of *Great Lakes Dredge & Dock Company* v. *Huffman*, *supra*, as it appears that the respondent had a plain, speedy and efficient remedy in the administrative bodies and the courts of the State of New Jersey.

II

The Court did not have jurisdiction of the respondent's complaint and the alleged cause of action set forth therein.

While it is true that in the case at bar no prayer for injunction was made, the effect of the Court assuming jurisdiction and entering summary judgment in favor of the respondent and against the petitioners is to grant complete immunity from taxation to respondent for the two years involved in this suit. It is, therefore, just as effective as if these petitioners had been enjoined and restrained from proceeding with the assessment and collection of the tax.

Such action is prohibited by virtue of 28 U. S. C. A. Sec. 41 (1), which provides:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy, and efficient remedy may be had at law or in equity, in the courts of said state." (Enacted August 21, 1937.)

The respondent's action herein is an attempt to do indirectly what is prohibited by the Judicial Code. This question was discussed but not decided by this Court in *Great Lakes Dredge & Dock Company* v. *Huffman, supra*, when it said:

> "It is true that the Act of Congress speaks only of suits 'to enjoin, suspend, or restrain the assessment, levy, or collection of any tax' imposed by a state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure. * * *"

Several courts that have considered this question have held that such procedure is barred by the section of the Judicial Code quoted. *Collier Advertising Service, Inc.* v. *City of New York, et al.*; 32 Fed. Sup. 870 (S. D.).

In *West Publishing Co.* v. *McColgan*, 138 Fed. (2d) 320 (9th C. C. A.), a declaratory judgment suit was filed against the tax commissioner of the State of California praying that the Court declare that an assessment of income taxes against the plaintiff under the California statute be held invalid and also praying for an injunction. The prayer for injunction was abandoned. The District Court dismissed the complaint and this was affirmed by the Circuit Court of Appeals. The Court held that if a declaratory judgment were entered in favor of the plaintiff even though the prayer for injunction were denied, the effect of such a judgment would amount to a suspension of the assessment and restrain, and enjoin the collection of the tax. The Court in its opinion said at page 325:

> "The first question is answered by the prayer of the complaint; if the relief demanded were granted, the judgment unquestionably would 'enjoin, suspend or restrain' the assessment and collection of the tax. If the State could not collect the tax because of a judgment, no one would have the temerity to deny that it was very effectively enjoined and restrained. See *Collier Advertising Service* v. *City of New York*, supra; *Helms Bakeries* v. *State Board of Equalization*, 53 Cal. App. 2d 417, 128 P. 2d 167, 170. Although the appellant apparently has abandoned its prayer for injunction, what we have said applies with equal force to either remedy sought. It is, in the circumstances, wholly unnecessary to discuss 'irreparable injury.'"

See Borchard on Declaratory Judgment, Second Edition, page 828, wherein commenting on the *Collier* case he says:

> "Yet District Judge Clancy was probably correct in refusing under the Johnson Act to take jurisdiction of a federal suit for a declaratory judgment to hold invalid the 2% New York City sales tax as applied to a purchase of 12 cents or less. * * * In so holding, the court was apparently correct, for the Johnson Act was designed to prevent federal assumption of jurisdiction to adjudicate and not merely the issuance of an injunction."

The adequacy of the remedy of the respondent in the state courts was fully discussed under Point I and will not be reiterated here.

We respectfully urge that the effect of the assumption of jurisdiction of the declaratory judgment action in this case was just as effective as if the Court in the first instance had enjoined the collector of taxes of the Township of Hillsborough from collecting the tax, and that such action is prohibited by the section of the Judicial Code cited.

III

The Court erred in entering summary judgment in favor of the respondent and against the petitioners.

The Court denied the right of the petitioners to a hearing on the merits and entered summary judgment based on the affidavit of the attorney for the respondent, Shelton Pitney, Esq., and the state case law. The Court based its judgment on the ground that the taxes were assessed by resolutions without notice to the respondent and without a hearing and were, therefore, null and void under *Duke Power v. State Board of Tax Appeals, supra,* (p. 112a to p. 113a).

As we have pointed out under Points I and II, it is evident that the Court assumed jurisdiction on the basis of alleged intentional discrimination and that issue has never been determined, nor have the petitioners had an opportunity to meet it. The relief the Court gave was based on a remedy available to the respondent in the state court and not one requiring the intervention of the federal court.

It is very apparent that the Court was in error in finding that the respondent was entitled to judgment as a matter of law on the ex parte record before the Court.

The affidavit filed by counsel for the respondent is in great part hearsay and in the nature of a brief and not one that would be admitted in evidence. It attempts to incorporate by reference therein certain depositions taken of members of the Tax Board who are not now, and were not at the time the depositions were taken and the summary judgment entered, parties to the action. Affidavits to be used on summary judgment shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Federal Rules of Civil Procedure, 56, sec. e. *Person* v. *U. S.*, 112 Fed. Rep. (2d) 1, certiorari denied 311 U. S. 672.

None of the depositions referred to in the affidavit of counsel for the respondent had been offered in evidence, nor does it appear that there are any facts which would make them evidential under Federal Rules of Civil Procedure 26d.

For this reason we submit that the Trial Judge erred in considering the affidavit of counsel on the summary judgment proceeding.

There are a great many distinctions between the case at bar and *Duke Power Company* v. *State Board of Tax Appeals, supra,* on which the Trial Judge based his decision.

In the *Duke Power* case the tax was assessed for the year 1939.

Under the New Jersey Statutes there are two methods of including property omitted from the tax list. R. S. 1937, 54:3-20 provides a method for the inclusion of property omitted by the assessor and another method for the inclusion of property omitted from the assessment. When property has been omitted from assessment by the local assessor, the county Tax Board shall by resolution cause to be entered upon the tax duplicate a proper assessment and immediately give notice of such entry and of the time and place of its next meeting to the owner of the property affected. The other method is that on the written complaint of the collector or any taxpayer of the taxing district specifying property that has been omitted in the assessment, the County Tax Board on five days' notice in writing to the owner by the party complainant and after due examination and hearing may enter the omitted property by judgment rendered within ten days after the hearing.

In the *Duke Power* case the court found as a fact that the property was not assessable in Hillsborough Township because the identical property had been assessed and taxes paid thereon in the State of North Carolina and, therefore, the property was exempt from taxation in the State of New Jersey. R. S. 1937, 54:4-3.2.

In the case at bar no claim is made that the respondent individually or as trustee of the Duke Endowment has ever paid any tax in New Jersey or elsewhere on the property for which the assessments were levied.

In the *Duke Power* case the proceeding was originally instituted under the second section of the statute by giving five days' notice in writing that a hearing was to be held. On November 13, 1940, a hearing was held and on November 18, 1940, the assessment was levied on certain cash. On November 22, 1940, the County Tax Board without any notice to the Duke Power Company entered an additional assessment against it for intangible personal property omitted from the assessment of November 18th. At the next meeting of the Tax Board the attorneys for the Duke Power Company appeared before the Board and were refused a hearing. In the *Duke Power* case the Court pointed out that it was not necessary to consider the application of the remedial statutes, R. S. 1937, 54:4-58 to 54:3-60, as none of the property was liable to taxation in the Township because a tax had already been paid on the property in North Carolina and it was, therefore, exempt under the New Jersey statutes.

In the case at bar taxes were assessed for the years 1940 and 1941 and no claim for exemption was filed by the plaintiff on any of the property assessed, nor was any action taken by the respondent for a hearing or review of the assessments in the state administrative boards or Courts. The Trial Court gave no consideration to the remedial statute which provides:

> "54:4-58. No tax, assessment or water rate imposed or levied in this state shall be set aside or reversed in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying or levying any such tax, assessment or water rate, or in the proceeding for its collection if the person against whom or the property upon which it is assessed or laid is, in fact, liable to taxation, assessment or imposition of the

water rate, in respect to the purposes for which the tax, assessment or rate is levied, assessed or laid."

"54:4-59. The Court in which any action, suit or proceeding is or shall be pending to review any such tax, assessment or water rate shall amend all irregularities, errors or defects, and may if necessary ascertain and determine the sum for which the person or property was legally liable and by order or decree fix the amount thereof. The sum so fixed shall be the amount of tax, assessment or water rate for which the person or property shall be liable."

The Circuit Court of Appeals held that the foregoing statutes were not applicable to these assessments. An examination of the cases construing these statutes shows clearly that they were intended to cure or remedy any irregularity or defect in assessing, laying or levying any tax. The Courts of New Jersey have been consistent in according a broad interpretation to these statutes so that no property legally taxable in the State should escape taxation through any mistake or illegality of any kind by the taxing officials. These statutes were originally passed as Chapter 157, Laws of 1881.

In an early construction of the statute in *Conover* v. *Honce*, 46 N. J. L. 347, Chief Justice BEASLEY, speaking for the Court of Errors and Appeals, said:

"As I read that act, its effect is to destroy, root and branch, the power to defeat such a proceeding except upon a meritorious ground. If the person or the property be not taxable, the processes of appeal and certiorari retain their usual efficacy, but, touching forms and irregularities of procedure, they have

been stripped of all force whatever. In fact, the statute, in very terms, declares that such shall be its effect."

In *Saunders* v. *Morris*, 48 N. J. L. 99 (Sup. Ct., 1886), 2 Atl. Rep. 666, an assessment had been made under a statute repealed by the constitutional amendment of 1875 requiring the taxation of property by general laws. Although the assessment was made under a void statute, the nature of the illegality there was held not to warrant the invalidation of the assessment because of this curative statute. The Court in that case said:

"Under such circumstances, the general act respecting taxes, assessments and water rents, approved March 23, 1881 (Pamp. L. 1881, p. 194) prohibits the court from annulling taxes, merely because of illegality in the assessment of the same, and makes it our duty to see that the complaining taxpayer bears his fair share of the common burden."

In *Muscanetcong Iron Works* v. *Netcong*, 90 N. J. L. 58; 99 Atl. Rep. 914, an assessment of omitted property was made by the tax collector without giving the taxpayer notice of the next meeting of the county board as required by the statute. The Supreme Court in affirming the assessment levied against the taxpayer without the notice prescribed by the statute said:

"Under section 39 of the Tax Act we are forbidden to set aside the tax for irregularity or defect in form or illegality in assessing, laying, or levying the tax, if in fact the prosecutor is liable to taxation in respect of the purpose for which the tax is levied. Such is the present case."

In *Manistee Iron Works Co.* v. *Raritan Township*, 12 N. J. Misc. 143 (Sup. Ct. 1934), 170 Atl. Rep. 39, the curative statute was applied where a local assessor assessed taxes against a corporation for the years 1926 to 1931. Discovering that the property belonged to the Manistee Iron Works and not the corporation assessed he then made pencilled changes upon his records, transferring the assessments to the Iron Works. The tax remained unpaid and the property was sold for taxes and a review of the proceedings was sought. The assessment was affirmed under the curative provisions of this statute. The Court held that this legislation was not confiscatory as the owner of the property knows that it is subject to taxation and he is under a duty to make reasonable inquiry as to its taxes. On the question of the loss of the taxpayer's appeal to the County Tax Board the Court said:

> "Although the prosecutor could not appeal to the county board or other agency designed for the correction of errors, and, in fact, had no previous notice of the action taken, does not unjustly affect the prosecutor, since a review in the court affords a full and effective remedy within the purview of the organic law. The law does not require that the prosecutor shall have a right to review by the state tax board. It is sufficient that he be not deprived of his property without due process of law."

In *Ridgewood Elks Holding Corporation* v. *Village of Ridgewood*, 127 N. J. L. 295 (E. & A. 1941), 22 Atl. (2d) 266, the taxing district had entered as exempt on its tax list for 1937 and 1938 a large building owned by the taxpayer and five acres of a fourteen acre tract on which the building stood. The remaining nine acres were entered as taxable and tax bills were submitted for this and paid by the owner. Some time thereafter the tax assessor on his own volition

and without any notice of the action to the taxpayer changed the tax duplicates and cancelled the exemptions originally noted and entered all of the property as taxable. Demand for the additional taxes due for the years 1938 and 1939 was not made until August, 1940, and the property was sold for non-payment of such taxes on October 1, 1940. The Court held that the curative statute was applicable and found that the property should have been subject to such taxation in the first instance and affirmed the judgment dismissing the taxpayer's appeal.

In the case cited no demand was made for the additional taxes until August, 1940. This was beyond the time which the taxing district would have had under the statute to add this property to the tax list as omitted property. Under R. S. 1937, 54:3-20, the proceedings to add omitted property must be brought within one year from the date on which taxes become a lien on real property. This time for the 1938 taxes expired on December 1, 1939, and no proceedings had been taken to add this omitted property to the tax list in accordance with the statute. It was done solely by the tax assessor on his own volition and without notice. The Court in that case said:

> "Our view then is that in an attack upon a proceeding for the collection of a tax, where the invalidity claimed is one in the assessment, the quoted statute applies, and we should not set aside a sale upon the ground that the assessment was irregularly made if the property is, in fact, liable to the tax which was sought to be imposed. If the certiorari were to review the assessment itself, under R. S. 54:4-59, the court would be under the duty to correct all irregularities and errors and determine the sum for which the property was legally liable and fix the amount thereof. In any event, we think we should not set aside the sale

upon a holding that the assessment was irregularly made in the face of the statutory direction that assessments shall not be voided when the property is liable for the tax levied."

It is contended by the respondent that the Remedial Statutes, 1937, 54:4-58 to 54:4-60 do not apply where the statute for the addition of omitted property is not complied with because of a statement made to that effect by the New Jersey Supreme Court in *Duke Power Co.* v. *State Board of Tax Appeals*, 129 N. J. L. 449, 30 Atl. 2d 416, affirmed 131 N. J. L. 275, 36 Atl. 2d 201. The reference to this statute, in the opinion in *Duke Power, supra*, is mere dictum, as the Court did not consider the statute in determining the issues raised.

The Court in the *Duke Power* case said:

"Since none of the property in question was liable to taxation in Hillsborough Township we need not consider the application of the remedial statutes. N. J. S. A. 54:4-58, 54:4-60. * * * "

It is obvious from this statement that the Court did not consider the remedial statutes referred to in the adjudication which it made. Notwithstanding this, the Court went on to say that the remedial statutes were not a substitute for proper assessment and that their application has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner, and that the remedial statutes did not apply where the procedure for the addition of property omitted from the assessment is not complied with.

That this statement is dictum and also an erroneous statement of the law as appears from the adjudications where the remedial statutes have been construed and applied can be demonstrated.

In *Crescent Ring Co.* v. *Travelers Indemnity Company*, 102 N. J. L. 85, 132 Atl. Rep. 106, the Court of Errors and Appeals in defining dictum said at page 89:

> "Obiter dictum is an expression of opinion by the court or judge on a collateral question not directly involved, or mere argument or illustration originating with him, while judicial dictum is an expression of opinion on a question directly involved, argued by counsel and deliberately passed on by the court, though not necessary to a decision. While neither is binding as a decision, judicial dictum is entitled to much greater weight than the other and should not be lightly disregarded."

It will, therefore, be seen that at best the statement referred to is judicial dictum and not binding as a decision on the Federal Courts although entitled to greater weight than obiter dictum, and this is so whether the statement is a pronouncement of the New Jersey Supreme Court or the Court of Errors and Appeals.

It is the petitioners' contention that, therefore, the Trial Court in the case at bar should have considered the remedial statutes and should have made an independent examination of the cases in New Jersey construing the effect of the statutes.

The statute clearly states that no tax assessment imposed or levied shall be set aside for any irregularity or defect in form or illegality in assessment if the person or property is in fact liable for the tax. It further provides the same protection up to and including the proceedings for collection of the tax.

In *Dodge* v. *Love*, 47 N. J. L. 436, affirmed 49 N. J. L. 235, the Court pointed out that the purpose of the statute is to act within its scope until all of the steps necessary in levying and collecting the public revenues have been completed. In that case the Court said:

> "The act is remedial and should be liberally construed to embrace within its scope all the steps necessarily taken in levying the public revenues. That such was the legislative purpose is manifested by the fact that its operation is expressly extended to the proceedings for the collection as well as for the assessment of taxes. It could not have been intended to exclude the intermediate steps between the initial and final procedure."

In the *Ridgewood Elks* case, *supra*, the Court of Errors and Appeals did exactly what the dictum in the *Duke Power* case said could not be done. It applied the remedial statutes to validate a tax illegally entered as property omitted in the assessment.

In the *Duke Power* case the Court stated that property omitted by the assessor must be added to the tax list before April 1st of the taxable year. That any property added to the tax list after April 1st of the taxable year must be in accordance with the second section of R. S. 54:3-20 and added as property omitted in the assessment. This section provides for a hearing by the county tax board after a complaint has been filed and on five days' notice of the hearing to the taxpayer, and also a judgment thereafter within ten days.

In the *Ridgewood Elks* case taxes were assessed for the years 1938 and 1939. A building and five acres of land owned by the taxpayer were not included because the assessor assumed they were exempt from taxation. These taxes were paid.

On March 21, 1939, the State Tax Board handed down a decision relating to the 1937 tax voiding similar exemptions for that year. The 1938 and 1939 taxes were not involved in that case.

The only way the building and land exempted could be added to the tax list for 1938 and 1939 was in accordance with R. S. 54:3-20.

On the 1938 tax the County Tax Board was required under the statute to hold a formal hearing with due notice and the entry of a judgment.

The local assessor took it upon himself to change his tax duplicates for 1938 and 1939 by adding to the assessment the value of the previous exempt building and five acres of land. The County Tax Board did not undertake to act in any respect.

Under the statute as construed in the *Duke Power* case the local assessor had no more right to add the additional assessment than would a complete stranger.

Notwithstanding these facts, the Court of Errors and Appeals upheld the illegal assessment of property omitted in the assessment by applying the remedial statutes and held that it would not set aside a tax where the invalidity claimed is one in the assessment.

We, therefore, submit that if the courts below, in the case at bar, had considered the remedial statutes and had made an independent examination of the cases relating to the application of the remedial statutes, it would have been clear to those Courts, that they are applicable in the situation presented here and would have validated any illegality in the assessment.

It will be seen that, in the *Ridgewood Elks* case, *supra*, the invalidity claimed was the illegality of adding property that had been omitted originally by the assessor and this was held to be valid under the curative statute, although there were no legal proceedings taken to add the property to the tax list. This certainly is a far broader construction of the curative statute than is necessary to sustain the assessment made in this case, assuming the irregularity contended for by the respondent exists, and particularly is this so in view of the allegation of the answer of petitioners that the respondent purposely concealed the nature and extent of assets and property taxable to her individually and as trustee of the Duke Endowment.

The respondent in this case did not attend at the hearing of the County Tax Board subsequent to the receipt of the certified copies of the resolutions levying the tax, of which she had notice, and made no effort to claim any exemptions provided under the New Jersey statutes. The only presence of the respondent at this hearing of the Tax Board was one by her counsel, who was there to assist the United States Marshal in serving the summons on members of the Tax Board in the institution of the present action.

CONCLUSION

For all these reasons, we respectfully submit that the Trial Judge erred in entering summary judgment in favor of the respondent herein and against the petitioners.

The writ should be granted.

Respectfully submitted,

SAMUEL I. KESSLER,
Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM—1945

No. 305

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough,
Petitioners,

vs.

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment,
Respondent.

BRIEF FOR PETITIONERS

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Supreme Court of the United States

OCTOBER TERM—1945

No. 305

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough,

Petitioners,

vs.

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment,

Respondent.

BRIEF FOR PETITIONERS

Jurisdiction

This case comes here on a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit pursuant to the provisions of the United States Code, Title 28, Section 344(b). The petition was filed on the 8th day of August, 1945, and the writ of certiorari granted October 8, 1945.

Opinions Below

The writ seeks the review of the final judgment of the United States Circuit Court of Appeals for the Third Circuit entered on May 9, 1945, affirming a judgment of

the United States District Court for the District of New Jersey, entering a summary judgment in a declaratory judgment action, in favor of the respondent and against the petitioners voiding four tax assessments levied against the respondent in her individual capacity and as Trustee of the Duke Endowment, a common law trust created and existing by virtue of the laws of the State of New Jersey.

The opinion of the Circuit Court of Appeals is reported in 149 Fed. (2d) 617 and at pages 148 to 155 of the Record. The opinion of the United States District Court for the District of New Jersey is reported in 56 F. Sup. 41 and at pages 111a to 113a of the Record.

The United States District Court for the District of New Jersey entered a summary judgment on what it conceived to be the state law, but assumed and retained jurisdiction on the ground of the allegations in the complaint that the plaintiff had been intentionally and systematically discriminated against and that there was not an adequate remedy in the state courts for such discrimination so that the existing state law was in conflict with the federal constitution.

The District Court's opinion on the motion of petitioners' to dismiss the complaint may be found at pages 74a to 80a of the record.

The Circuit Court of Appeals affirmed the judgment of the District Court on the ground that the assessments were void under the state law and that the New Jersey law did not provide an adequate remedy for a taxpayer who was intentionally and systematically discriminated against and that, therefore, the New Jersey law violated the Equal Protection Clause of the Constitution.

Statement of Facts

The proceedings pertinent to this appeal are as follows:

On July 14, 1941, the respondent instituted her action individually and as trustee of the Duke Endowment against the Township of Hillsborough, Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting the Somerset County Board of Taxation, and Charles V. N. Davis, Tax Assessor of the Township.

The action was instituted solely and by virtue of the Federal Declaratory Judgment Act. U. S. C. A. Title 28, Sec. 400 (p. 7a to p. 9a). The relief sought was a declaration by the Court that four intangible personal property tax assessments for the years 1940 and 1941 levied by the Somerset County Board of Taxation against the respondent individually and as trustee of the Duke Endowment, a common law trust, be held null and void (p. 35a).

After issue was joined the Trial Court on motion of the respondent entered a summary judgment based on what it conceived to be the state law in favor of the respondent and held that the assessments were null and void. The assumption and retention of jurisdiction by the Court and the entry of judgment and affirmance on appeal results in this appeal (p. 114a to p. 116a).

The complaint alleges that the respondent is a resident of the Territory of Hawaii and that on November 7, 1940, while respondent was at her home in the Territory of Hawaii the defendant Davis, as tax assessor of the Township of Hillsborough, wrote her a letter directed to her at Duke Farms, Hillsborough Township, asking that respondent give a true account of her personal property, money, effects and credits, as of the first day of October, 1940, so that the assessor could fix a proper assessment of

all her personal property taxable in Hillsborough Township.

On December 4, 1940, Freeman J. Daniels, Esq., an attorney representing the respondent, wrote to defendant Davis acknowledging receipt of the letter on her behalf and stating that the respondent was not further taxable in the Township with respect to any personal property because on that date she was not a resident of the State of New Jersey.

It is alleged that prior to October 1, 1940, respondent ceased to be a resident of the Township of Hillsborough and had established her residence in the Territory of Hawaii. It further alleged that an assessment had been made against the respondent individually on account of her personal property for the taxing year 1941.

On June 26, 1941, the said defendants, Lifgren, Davenport and Soriano, sitting as the Somerset County Board of Taxation, adopted a resolution which recited that after due inquiry and examination it determined that the respondent was on October 1, 1939, a resident of Hillsborough Township and that taxable intangible personal property owned by the respondent on October 1, 1939, was entirely omitted by the assessor of Hillsborough Township from the assessment of property of said Township for the taxing year 1940, and in its resolution assessed as omitted property againt the respondent individually for the taxing year 1940 an assessment in the sum of $60,054,424, based upon intangible personal property owned by the respondent on October 1, 1939, the taxing date on which the assessment is made for the year 1940.

The resolution recites that the assessment was entered as a result of the application of the petitioner Horner, a resident and taxpayer and the collector of taxes of the defendant Hillsborough Township, and that his application was supported by proof (p. 37a to p. 39a).

On the same date a similar resolution was adopted by the said Somerset County Board of Taxation entering an assessment against the respondent individually in the same amount for intangible personal property owned by her on October 1, 1940, and which was omitted from the assessment by the assessor of Hillsborough Township for the taxing year 1941 (p. 39a to p. 41a).

On the same date another resolution was adopted by the said Somerset County Board of Taxation against the respondent as trustee of the Duke Endowment assessing a tax against her as trustee of the Duke Endowment for intangible personal property owned by the said Duke Endowment on October 1, 1939, and omitted by the assessor of Hillsborough Township from the assessment of property for the taxing year 1940. The amount of the assessment based upon the personal intangible property owned by said Duke Endowment was in the sum of $161,886,014 (p. 43a to p. 45a).

On the same date another resolution was adopted by the said Somerset County Board of Taxation against the respondent as trustee of the Duke Endowment for the intangible personal property owned by the said Duke Endowment on October 1, 1940, and omitted by the assessor of Hillsborough Township from the assessment of property for the taxing year 1941. The amount of the assessment was the same as in the first resolution against the Duke Endowment (p. 46a to p. 48a).

Certified copies of all the resolutions and schedules annexed thereto were mailed to the respondent at her home in Hillsborough Township on June 27, 1941, and received there. She was advised at that time that the next regular meeting of the Tax Board would be held on July 14, 1941, at 10:30 A.M. at the Court House, Somerville, New Jersey (p. 16a, p. 36a, p. 42a). The respondent did not appear at this meeting but instituted the declaratory judgment action on that day.

It is alleged that the taxes assessed against the respondent individually were invalid because prior to October 1, 1940, she was not a resident of the Township of Hillsborough; that the Somerset County Board of Taxation did not have any power or jurisdiction to make the assessment, that the respondent, individually and as trustee, was unjustly, arbitrarily and fraudulently discriminated against in the assessment of taxes and that her constitutional rights had been infringed. She denied that she owned the property assessed individually or as trustee of the Duke Endowment and alleged that she did not receive any notice of the assessment prior to its entry. She avers that the Duke Endowment is a common law trust created by James B. Duke on December 11, 1924, and is devoted to charitable purposes, and that the intangible personal property of the Duke Endowment was in the custody of its treasurer, a resident of the State of New York.

The respondent prayed that the Court by virtue of the Federal Declaratory Judgment Act declare the assessments and resolutions adopted by the Somerset County Board of Taxation be held wholly null and void (p. 7a to p. 35a).

On September 8, 1941, an order was entered by the Court dismissing the suit as to defendants, Lifgren, Davenport and Soriano, constituting the Somerset County Board of Taxation.

The answer filed by the petitioners denied that the respondent was not a resident of the Township of Hillsborough and denied that she had paid any tax for the years 1940 and 1941 on her personal intangible property and denied that the Duke Endowment had paid any tax at any time to Hillsborough Township. The answer also denied that the assessments were entered contrary to law and in violation of the constitutional rights of the respondent and denied all charges of fraud and intentional discrimination.

The answer averred that the Duke Endowment is a common law trust created and existing by virtue of the laws of the State of New Jersey and when created by James B. Duke he was a resident of Hillsborough Township and the situs of all of its personal intangible property was at all times in Hillsborough Township. The answer also avers and alleges that the taxes were assessed in accordance with the Statutes of the State of New Jersey and that legal notice was given to the respondent of the date of the meeting following the enactment of the resolutions at which time she had an opportunity to be heard in respect to the assessments. It further alleges that the respondent individually and as trustee had concealed the assets which were taxable and had refused to give any information relative thereto.

The answer specifically challenged the jurisdiction of the Court on the ground that the suit was not within the Federal Declaratory Judgment Act, that it was in effect the enjoining of the collection of a state tax and that the plaintiff had a plain, speedy, efficient and complete remedy in the administrative bodies and courts of the State of New Jersey (p. 50a to p. 70a).

On November 3, 1941, petitioners and the remaining defendant moved to dismiss the complaint on the ground that the Court was without jurisdiction under the Federal Declaratory Judgment Act, that the respondent had a speedy, adequate and efficient remedy in the administrative bodies and courts of the State of New Jersey, that the purpose of the action was in effect to enjoin, suspend or restrain the assessment, levy or collection of a tax imposed by the laws of the State of New Jersey contrary to the provisions of U. S. C. A. 28, Sec. 41, Subdiv. 1, and that the respondent failed to exhaust her remedies in the administrative bodies and the courts of the State of New Jersey, and that the members of the Somerset County Board of Taxation were necessary and indispensible parties to the action (p. 71a to p. 73a).

On July 30, 1942, the Trial Judge filed his opinion denying the motion to dismiss on the ground that the Court did have jurisdiction within the Federal Declaratory Judgment Act, that the members of the Tax Board were not necessary parties, that the proceeding was not one to enjoin, suspend or restrain the collection of a tax and that the respondent did not have an adequate remedy in the administrative bodies and the courts of the State of New Jersey would not give adequate relief to redress intentional discrimination (p. 75a to p. 80a).

On August 10, 1942, an order was entered denying the petitioners' motion to dismiss (p. 80a to p. 81a).

On March 27, 1944, the respondent filed a motion for summary judgment against the petitioners based on an affidavit of Shelton Pitney, Esq., and by reference therein to depositions taken by the respondent from various witnesses which had been filed with the Clerk of the Court but which had not at any time been offered as evidence (p. 82a to p. 108a).

A motion at the same time was made to dismiss the complaint by the petitioners on the ground that the Court did not have jurisdiction, and that the Court in its discretion should not entertain jurisdiction on the ground that the respondent had a plain, adequate and complete remedy in the administrative bodies and the courts of the State of New Jersey, and as to the defendant Davis that he was not a necessary party (p. 109a to p. 110a).

On July 14, 1944, the Trial Judge filed his opinion granting the motion as to the defendant Davis and denied the petitioners' motion to dismiss the complaint and entered summary judgment in favor of the respondent and against the petitioners. The Court held the taxes to be invalid and based his decision on the affidavit of Shelton Pitney, Esq., and the decision of the New Jersey courts in *Duke Power Company* v. *State Board of Tax Appeals*, 129 N. J. L. 449, 30 Atl. (2d) 416, affirmed 131 N. J. L. 275, 36 Atl. (2d) 201.

The Court below held that the respondent had not had proper notice, or a hearing on the assessments, and that the assessments were made at a time when the Tax Board did not have jurisdiction.

The Court recognized the fact that there was an adequate state administrative and legal remedy because his decision was based on a ruling of the New Jersey courts which gave complete and adequate relief to the taxpayer, but held that the Court would still retain jurisdiction and decide the case on state law because the Court had originally taken jurisdiction on the ground of discrimination (p. 112a to p. 113a).

On August 7, 1944, the Court entered its summary judgment in favor of the respondent and against the petitioners (p. 115a to p. 116a). Upon appeal, the Circuit Court of Appeals for the 3rd Circuit affirmed this judgment.

Questions Presented

1. Did the Trial Court err in assuming and retaining jurisdiction of the respondent's complaint and the alleged cause of action set forth therein under the Declaratory Judgment Act on the alleged ground that under the laws of the State of New Jersey the respondent was without an adequate remedy in the state administrative bodies and courts for alleged intentional and systematic discrimination in the imposition of taxes, and that the state law was, therefore, in conflict with the Federal Constitution?

2. Did the District Court have jurisdiction of the respondent's complaint and the alleged cause of action set forth therein in view of the Johnson Act, 28 U. S. C. A., Sec. 41(1)?

3. Did the District Court err in granting a summary judgment in favor of the respondent and against the petitioners based on the state law?

POINT I

The Trial Court erred in assuming and retaining jurisdiction of the respondent's complaint and alleged cause of action set forth therein under the Declaratory Judgment Act.

The respondent sought by declaratory judgment to nullify two tax assessments for personal intangible property levied against her individually and two tax assessments levied against her as Trustee of the Duke Endowment, a common law trust created and existing by virtue of the laws of the State of New Jersey, also for personal intangible property. The District Court assumed and retained jurisdiction of the plaintiff's complaint and entered a summary judgment against the petitioners and in favor of the respondent on what it conceived to be the state law. The District Court retained jurisdiction of the complaint and alleged cause of action solely on the ground that the administrative bodies and the courts of the State of New Jersey failed to afford a full, complete and adequate remedy to redress intentional and systematic discrimination as alleged in the complaint.

It is the contention of the petitioners that the District Court erred in assuming and retaining jurisdiction of the plaintiff's complaint and should have either dismissed the complaint or retained jurisdiction of the complaint and compelled the respondent to exhaust her remedies first in the state administrative bodies and courts, and that in fact the New Jersey Court of Errors and Appeals, the Court of last resort in New Jersey, has accepted the legal principle laid down by this Court on the question of discrimination in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190. This rule was recognized and applied in *Central R. Company* v. *Martin, State Tax Commissioner*, 112 N. J. L. 5, 169 Atl. Rep. 489, certiorari

denied 293 U. S. 568, 79 L. Ed. 667, 55 Sup. Ct. 79. That case is the last word on this issue by the Court of Errors and Appeals of New Jersey, and it is the view of the petitioners that under *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, it is binding on the federal courts.

If the judgment of the District Court as affirmed by the Circuit Court of Appeals stands, then any New Jersey taxpayer who claims intentional and systematic discrimination in reference to any tax, whether it be for personal, intangibles or real property, can by filing a declaratory judgment suit in the federal court directly or indirectly enjoin the collection of the taxes assessed and without affording the state administrative bodies and courts an opportunity to correct such discrimination, if in fact it exists. That this is a serious and harmful interference with the fiscal operations of a state government and its subdivisions is apparent, and such an interference this Court has held should not be countenanced where the asserted federal right may be preserved without it.

It has been definitely settled by this Court, in *Great Lakes Dredge and Dock Company* v. *Huffman*, 319 U. S. 293, 63 S. Ct. 1070, 87 L. Ed. 1407, that the federal courts will not entertain a declaratory judgment suit instituted for the purpose of having the federal courts determine the invalidity of tax assessments, where the asserted federal right may be preserved without it and this is so whether or not it is apparent to the Court that the tax is invalid. This Court held that the considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, applied to the use of the declaratory judgment procedure. An examination of that case will disclose that under the law set forth therein the Trial Court in the case at bar should not have assumed jurisdiction of the respondent's suit, but should have dismissed it, or compelled the respondent to exhaust her remedies in the state tribunals.

In that case an action was instituted in the United States District Court for the Eastern District of Louisiana praying that the Court declare that a state law of Louisiana as applied to the plaintiffs and their employees was unconstitutional and void. The issue raised in that case was the applicability of the Louisiana State Unemployment Compensation Law to maritime employees.

The validity of the tax was upheld in the District Court and in the Circuit Court of Appeals and at no time did either of those courts or the parties themselves raise the question of jurisdiction.

On granting a writ of certiorari this Court requested counsel "to discuss in their briefs and on oral argument the question of whether the declaratory judgment procedure can be appropriately used in this case where the complaint seeks a judgment against a state officer to prevent enforcement of a state statute."

There was not any allegation in the complaint in that case for any order to enjoin or restrain the taxing authorities but prayed for declaratory judgment as to the validity of the tax.

This Court held that the Trial Court in its discretion should not have entertained jurisdiction of a declaratory judgment suit to determine the validity or invalidity of a state tax and affirmed the dismissal of the Court below solely on the ground "that, in the appropriate exercise of the Court's discretion, relief by way of a declaratory judgment should have been denied without consideration of the merits."

In its opinion this Court said:

> "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied

> in every case where the asserted federal right may be preserved without it. * * *"
>
> "For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure."

Applying that law to the facts in the case at bar as they appear from the record, it is clear that the Court below erred in assuming and retaining jurisdiction of the respondent's declaratory judgment suit and in entering summary judgment.

As appears from the complaint filed in this action relief was sought solely under the Federal Declaratory Judgment Act and the prayer of the complaint is that the assessments be declared wholly invalid and void (p. 35a).

The taxes assessed against the respondent individually and as trustee of the Duke Endowment were levied by the Somerset County Board of Taxation. The tax assessed on intangible personal property is a state tax created by the statutes of the State of New Jersey. *Jersey City* v. *Martin*, 126 N. J. L. 353, 19 Atl. (2d) 40, N. J. Rev. St. 1937, 54:4-1.

There is no distinction between the object sought in the case at bar and in *Great Lakes Dredge and Dock Co.* v. *Huffman, supra.* In both instances declaratory judgments were sought as to the validity or invalidity of a state tax and for that reason that case is applicable here. As stated by this Court in that case:

> "Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer—especially where the state, acting within its

> constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax. * * *"

There cannot be any question in the case at bar that the respondent had a plain, speedy and efficient remedy in the courts of the State of New Jersey if the taxes were illegally imposed. The Court below entered summary judgment against the petitioners on what it conceived to be the state law based on the decision of the New Jersey Supreme Court as affirmed by the Court of Errors and Appeals, in *Duke Power Company* v. *State Board of Tax Appeals*, 129 N. J. L. 449, 30 Atl. (2d) 416, affirmed 131 N. J. L. 275, 36 Atl. (2d) 201. The Trial Judge took the position that the law of that case was applicable to the facts in the case at bar and entered summary judgment for that reason and gave the relief which he believed would have been given the respondent in the state court.

The District Court found that the assessments were entered in each case after April 1st of the taxable year and, therefore, could be added only by a hearing after due notice and judgment, that this was not done, and therefore, the assessments were null and void. The District Court ignored the remedial statutes of the State of New Jersey and the Circuit Court of Appeals held the remedial statutes did not apply. The petitioners urge that this ruling is erroneous and that question is argued under Point III of the brief.

The Trial Court conceded that there was an adequate state administrative and legal remedy, but retained jurisdiction notwithstanding this on the ground that there was no point in sending the issue to the state court when the federal court could and did retain jurisdiction on the ground of discrimination. This is erroneous because it is based on the assumption that the Court had jurisdiction in the first instance and should retain it. It is not necessary at this

point to determine whether or not the Trial Judge's conclusions that *Duke Power Company* v. *State Board of Tax Appeals, supra,* is applicable and dispositive of the issues in the case at bar, for under *Great Lakes Dredge & Dock Co.* v. *Huffman, supra,* the correctness of the Trial Court's decision is immaterial if it lacked jurisdiction.

The petitioners contend that the Trial Judge erred in concluding that the *Duke Power* case was conclusive of the issues here, but assert the respondent at all times had a plain, speedy and efficient remedy in the administrative bodies and in the courts of the State of New Jersey. It is not contended by the respondent that if she could establish as alleged in the complaint that she was a non-resident at the time the tax was imposed, or did not own the property taxed, or that they were fraudulently imposed, or that the Tax Board did not have jurisdiction at the time it imposed the taxes, that she would not have any remedy in the courts of the State of New Jersey. Her claim has been, and the sole one on which the Trial Court claimed jurisdiction, that the courts of the State of New Jersey fail to provide an adequate remedy for a taxpayer against whom a tax has been assessed as the result of intentional discrimination.

The respondent had a right to appeal the assessments levied to the State Board of Tax Appeals where she would have had a trial *de novo* (Rev. St. 1937, 54:2-35). *City of Paterson* v. *Baker,* 139 Atl. Rep. 604; *Duke Power Company* v. *State Board of Tax Appeals, supra.* If not satisfied with the review before the State Board of Tax Appeals she could have applied to the New Jersey Supreme Court for a writ of certiorari to review the amount of the tax, the jurisdiction of the County Board, the validity or invalidity of the assessment, and all of the alleged legal impediments to the tax set forth in the respondent's complaint. *Pope* v. *Borough of Red Bank,* 19 Atl. (2d) 208; *Oradell* v. *State Board of Tax Appeals,* 125 N. J. L. 37, 13 Atl. Rep. (2d) 479; Rev. Stat. 54:4-59.

If the respondent had followed her administrative remedy in the State courts as was done in the *Duke Power Company* v. *State Board of Tax Appeals, supra,* she could have set up there all of the claims set up in her declaratory judgment suit. In that action Duke Power Company contended, as one of its grounds of appeal, that it had been intentionally discriminated against in having the taxes levied against it. See opinon of *State Tax Board,* 26 Atl. Rep. (2d) 713, wherein it is stated:

> "The petition of appeal before this Board charges that the assessments in question are contrary to our taxing laws, discriminatory, and in violation of the federal constitution. No attempt was made to prove the charge of discrimination and we therefore do not consider it . . . ."

The New Jersey Supreme Court on certiorari has the power to review and determine questions of fact as well as those of law. *Pennsylvania R. Co.* v. *State Board of Taxes and Assessments,* 103 N. J. L. 28; 134 Atl. Rep. 722; *Town of Kearney* v. *State Board of Taxes and Assessments,* 103 N. J. L. 26, 135 Atl. Rep. 61; *Colonial Life Insurance Company* v. *State Board of Tax Appeals,* 126 N. J. L. 126, 18 Atl. Rep. (2d) 625.

If the respondent was dissatisfied with the findings of the New Jersey Supreme Court she could then appeal to the Court of Errors and Appeals. *General Motors Corp.* v. *State Board of Tax Appeals,* 125 N. J. L. 574, 16 Atl. (2d) 632.

If the respondent were still dissatisfied and believed that she was deprived of any constitutional right, she had a right to apply to this Court for a review of the State Court's adjudication.

In this case the respondent has not made any payment of the tax assessed, but if she had and the tax was held invalid or excessive, she could recover any such payment

made in the event that it was not voluntarily returned by the taxing authorities. *Hahne Realty Corp.* v. *City of Newark*, 119 N. J. L. 12, 194 Atl. Rep. 191; *Francis Realty Co.* v. *City of Newark*, 16 N. J. Misc. Rep. 328, 199 Atl. Rep. 912.

Where a taxpayer has appealed to the State Board of Tax Appeals from the assessment against him and has paid to the collector of taxes such portion of the tax as he would be required to pay were his appeal sustained, the collector is excused from collecting the balance of the tax until the appeal is decided, and the Court of Chancery will enjoin the collection of any further amount until the appeal is decided. *Rice* v. *City of Newark*, 136 N. J. Eq. 53. The Supreme Court also has the power to stay the collection of the tax on the granting of a writ of certiorari. R. S. 1937, 54:5-10.

The Trial Court and the Circuit Court of Appeals fell into error in assuming that the courts of New Jersey would not permit a taxpayer to establish intentional discrimination in the assessment of a tax against him and to have an appropriate remedy.

In *Central R. Co.* v. *Martin, State Tax Commissioner*, 112 N. J. L. 5, 169 Atl. Rep. 489, certiorari denied 293 U. S. 568, 79 L. Ed. 667, 55 Sup. Ct. 79, the Court of Errors and Appeals of this State recognized the rule relating to intentional discrimination in the assessment of taxes as set forth by this Court in *Chicago C. W. Ry.* v. *Kendall*, 266 U. S. 94, and *Sioux City Bridge Co.* v. *Dakota Co.*, 260 U. S. 441.

In that case plaintiff sought a review of main-stem, tangible personal property and franchise tax for the year 1931. At that time the rate of taxation of main-stem, tangible personal property and franchise taxes were determined by dividing the aggregate taxes by the aggregate value of the general property in the state and the rate so arrived at constituted the average rate of taxation for the

year and was the rate to be applied to the railroad company. It was contended by the railroad that local assessors assessed local property at less than its true value and that the method employed by the local assessors throughout the state to bring about this result was to assess all property other than that of the appellant at not more than 60% of its true value. It claimed that its property was assessed at 100% of its true value and, therefore, sought to have its tax reduced to a 60% basis.

The railroad contended that the method of taxation employed deprived it of its property without due process of law in violation of the 14th Amendment of the Constitution and that the tax unlawfully discriminated against it.

In an effort to establish intentional and systematic discrimination, the railroad offered proof, which was accepted by the State Tax Board, of assessments made in sections of 14 of the 21 counties of the state and attempted to follow the character of evidence presented in *Louisville & Nashville Railroad Company* v. *Green, et al.*, 244 U. S. 522. The Court examined and considered all of the evidence produced by the railroad on which it based its claim of alleged intentional and systematic discrimination and found that the railroad had failed to establish intentional and systematic discrimination, and recognized the rule enunciated by this Court in *Sioux City Bridge Company* v. *Dakota County, supra.*

It appears from page 9 of the opinion in that case that the railroad did present evidence before the State Tax Board in an effort to establish that there was intentional discrimination on the part of the taxing authorities which violated the railroad's constitutional right. The State Tax Board found that the railroad had failed to establish that there was intentional discrimination on the part of the taxing authorities. A writ of certiorari was allowed by the New Jersey Supreme Court and in that Court the rail-

road was permitted to take depositions and presented additional evidence in an effort to establish intentional discrimination on the part of the taxing authorities. The New Jersey Supreme Court refused to review the appeal on jurisdictional grounds (109 N. J. L. 395). The Court of Errors and Appeals did review all of the evidence produced by the railroad before the Tax Board and before the Supreme Court on the question of discrimination and found that the proofs failed to establish the claim that the railroad's property was valued at a higher level than that of local assessable property generally, and that the proofs failed to establish that an organized effort was made by the local tax assessors to assess, systematically or intentionally, local property at less than its true value. That Court in its opinion, at page 14, said:

> "Appellant undertook to prove an organized and determined effort to undervalue property other than railroad property, systematically or intentionally. It must establish this undertaking as an adopted practice. *Chicago C. W. Ry.* v. *Kendall*, 266 U. S. 94; *Sioux City Bridge Co.* v. *Dakota Co.*, 260 *Id.* 441; *So. Ry. Co.* v. *Watts, Ibid*, 519. * * *"
>
> "Apellant failed to sustain the burden of proof that the 'average rate of taxation' was not computed by use of true values.
>
> As already pointed out we have fully considered the proofs submitted to the State Board of Tax Appeals as well as the proofs submitted on the rule to take depositions allowed in this cause."

At the time of this appeal there was not any state statute which authorized the railroads to specifically raise the question of illegal discrimination before the Tax Board or before the Supreme Court. There was in effect at that time Chapter 100 of the Laws of 1931, which, in Section 10, provided that the State Tax Board

> "is hereby empowered and charged with the duty to review, hear and determine all appeals by any per-

son, firm, or corporation, taxing district, municipality, or county, aggrieved by any act, proceeding, ruling, decision or determination of such appeals as will effectuate such final determination according to law."

The general language contained therein is not dissimilar from the language set forth in N. J. R. S. 54:2-35 which permits this respondent to appeal to the State Board of Tax Appeals in any action or determination of the County Board of Taxation.

It might be well to point out that when *Central Railroad Co.* v. *Martin, supra,* was pending in the Court of Errors and Appeals, the Legislature of New Jersey amended the Railroad Tax Act and provided specifically that if there was a claim of illegal discrimination in the assessment of property under that Act, a hearing could be had on such question before the State Board of Tax Appeals (Chap. 305, laws of 1933). This Statute became effective June 31, 1933, and was not considered in the decision in *Central Railroad* v. *Martin, supra.* That case was argued May 22, 1933, and decided December 7, 1933, and was to review taxes for the year 1931. The hearings in all of the administrative bodies and the Courts had been completed before the enactment of the Statute referred to and, therefore, did not have any relevancy nor was it considered by the Court in its opinion.

A reading of the opinion in *Central Railroad* v. *Martin, supra,* shows without question that the taxpayer did offer testimony both before the State Board of Tax Appeals and additional testimony in the Supreme Court after the granting of the writ of certiorari to prove alleged intentional discrimination on the part of the taxing authorities. The Court of Errors and Appeals considered this testimony and cited the law as laid down by this Court relating to intentional discrimination on the part of the taxing authorities in levying assessments, and found that the evidence produced did not establish intentional discriminaton.

It has been argued below by the respondent that this case was not applicable to the issues here because it did not involve a claim of discrimination within a single class of taxpayers. It is clear that the case was not argued or decided on the theory that all of the taxpayers within the class of railroads were taxed on the same basis, or that if there was discrimination in that property generally was taxed at a less value than railroad property, there was no violation of a constitutional right. On the contrary, that issue was not in the case and the Court considered the question of intentional discrimination in the same manner as if the complainant had been an individual and taxed under the general tax laws.

The Court in *Central R. R. Co.* v. *State Tax Department*, *supra*, stated at pages 7 and 8:

> "Notwithstanding the clear provisions of the law of arriving at the 'average rate of taxation' on its property in question, appellant asserted and sought to establish an organized and determined effort of local assessors to assess local property at less than its true value. The practice or the method employed by local assessors throughout the state to bring about this result, it is charged, was to assess all property other than that of the appellant at not more than sixty per cent of its true value. It is claimed that the property of the appellant was assessed at one hundred per cent of its true value. The result was that the average tax rate, so computed, amounted to $4.081 per $100 of value. It is further contended that if the average tax rate had been computed according to the true value of all property subject to local taxation throughout the state, as provided by law, the rate would not have been more than $2.093 per $100 of value.
>
> It therefore seems sound in logic and clear in reason that appellant must stand or fall on its ability to sustain by competent and satisfactory proof the basic or fundamental grievance asserted by it. For, if the foundation falls, all reasons based on that foundation must likewise fall.

> We therefore pass over all other questions and approach the inquiry, namely, did the appellant, by proper and satisfactory proof, sustain its basic or fundamental grievance? We think not."

The respondent contended in the courts below that the Supreme Court of New Jersey, the intermediate court of appeal, had in several cases refused to permit evidence of discrimination and that one of these cases, *Royal Manufacturing Co.* v. *Board of Equalization of Taxes*, 76 N. J. L. 402, 70 Alt. 978, was affirmed by the Court of Errors and Appeals in 78 N. J. L. 337, 74 Atl. 525, and that subsequent to *Central R. Co.* v. *Martin, State Tax Commissioner, supra*, a branch of the Supreme Court in *Lehigh Valley R. R. Co.* v. *Board of Tax Appeals*, 12 N. J. Misc. Rep. 673, 174 Atl. Rep. 359, held that the State Tax Board did not err in refusing to hear testimony of the taxpayer touching discrimination, and for that reason the respondent's remedy on the question of intentional and systematic discrimination in the courts of New Jersey was no remedy and uncertain, therefore, the Federal Court was justified in assuming and retaining jurisdiction.

Royal Manufacturing Co. v. *Board of Equalization of Taxes, supra*, was decided by the Court of Errors and Appeals in November, 1909, which was prior to *Sioux City Bridge Co.* v. *Dakota Co., supra*, which was decided in January, 1923.

In the *Royal Manufacturing Co.* case no reference is made to any case in this Court holding that the taxpayer's constitutional right has been violated when administrative bodies and state courts fail to provide an adequate remedy for intentional and systematic discrimination. None of the other cases cited by the respondent were ever passed on by the New Jersey Court of Errors and Appeals, and the question of intentional and systematic discrimination did not come before it again as far as we have been able to determine from the cases until *Central R. Co.* v. *Martin*,

State Tax Commisisoner, supra, decided in 1933, and there are not any cases subsequent to that time by that court to give the slightest indication that the New Jersey Court of Errors and Appeals will not follow that case if the issue is again presented to it.

The Trial Judge in his opinion on the first motion by the petitioners to dismiss, in discussing this case, assumes that if the Court had found that there was intentional discrimination that notwithstanding this it would not have granted any relief to the taxpayer, and that it appeared it was not the intent of the Court of Errors and Appeals to grant any relief to the taxpayer because subsequently a branch of the Supreme Court in *Lehigh Valley R. R. Co.* v. *State Board of Tax Appeals,* 12 N. J. Misc. Rep. 673, 174 Atl. Rep. 359, held that the State Tax Board did not err in refusing to hear testimony of the taxpayer touching discrimination.

At the outset it must be kept in mind that discrimination alone does not violate any constitutional right of the taxpayer. It must be an intentional or systematic discrimination.

It does not appear from *Lehigh Valley R. R. Co.* v. *State Board of Tax Appeals, supra,* whether or not there was any offer to prove intentional discrimination. Be that as it may, the decision of the Court of Errors and Appeals in *Central R. Co.* v. *Martin, supra,* stands unreversed and is the law of the State of New Jersey, and, of course, it could not be reversed by the subordinate New Jersey Supreme Court or any part thereof. Furthermore, under *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the Trial Judge was duty bound to accept the state law as determined by the highest court of the state. This Court was satisfied with the manner in which the constitutional rights of the taxpayer were protected in that case as it refused to review the proceedings. Whatever may have been the law in New Jersey

prior to *Central R. Co.* v. *Martin, supra,* is of no force i in view of that decision which stands unreversed.

If we assume for the purpose of argument that th is uncertainty in the Courts of New Jersey as to the a quacy of the respondent's remedy for intentional and s tematic discrimination, then it would seem under the r laid down by this Court in *Spector Motors Service McLaughlin,* 323 U. S. 101, the District Court should have proceeded to adjudicate the issues, but should ha retained jurisdiction of the complaint pending the det mination of proceedings to be brought by the respond with reasonable promptitude in the state administrat bodies or state courts. In this manner the constitutio rights of the respondent would have been fully protect for if the administrative bodies and the state courts fused to grant adequate relief to the respondent if s proved intentional and systematic discrimination, then s could have had her remedy immediately by means of junction and an adjudication of the issues in the Fede Court.

The Circuit Court of Appeals for the Eighth Circ has recently applied the rule laid down in the *Great Lak* v. *Huffman, supra,* case in *Miller, et al.* v. *City of Gree ville, Miss., et al.,* 138 Fed. (2d) 712. In that action, t City of Greenville, a Mississippi corporation, and Uni Planters National Bank & Trust Co., a national bank Tennessee, as trustee under a trust indenture, brought declaratory judgment action against the Arkansas Corpo tion Commission and its individual members, and agai tax officials of Chicot County, Arkansas, for a declarato judgment and prayed that the Court declare that the p tion of a bridge over the Mississippi River which was the State of Arkansas and owned by the City of Greenvil was exempt from taxation by the Arkansas state autho ties. The United States District Court for the Eastern D trict of Arkansas granted the plaintiffs' prayer and

tered a declaratory judgment in its favor. The District Court's judgment was entered October 28, 1942, prior to the opinion of this Court in the *Great Lakes* case. The Circuit Court of Appeals for the Eighth Circuit dismissed the declaratory judgment action on the basis of the mandate laid down by this Court in the *Great Lakes* case.

It is well established that the federal courts exercise an appropriate reluctance to interfere with the fiscal affairs of a state and it is the accepted practice that the federal courts relinquish their jurisdiction in favor of the state courts in respect to such matters if the full rights of the plaintiff can be there preserved without impairment. *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276; *Matthews* v. *Rogers*, 284 U. S. 521; *Pennsylvania* v. *Williams*, 294 U. S. 176.

And this is so even though a plaintiff charges a violation of rights guaranteed to him by the due process and equalization clauses of the 14th Amendment. It is accepted that the state courts bear equal responsibility with federal courts to guard and protect the rights secured by the Constitution of the United States. *U. S.* v. *Bank of New York*, 296 U. S. 463.

We, therefore, respectfully submit that the respondent's complaint should have been dismissed by the District Court, or, if the District Court retained jurisdiction of the complaint, the respondent should have been compelled to proceed with the determination of her claim in the administrative bodies and state courts.

POINT II

The Court did not have jurisdiction of the respondent's complaint and the alleged cause of action set forth therein.

While it is true that in the case at bar no prayer for injunction was made, the effect of the Court assuming jurisdiction and entering summary judgment in favor of the respondent and against the petitioners is to grant complete immunity from taxation to respondent for the two years involved in this suit. It is, therefore, just as effective as if these petitioners had been enjoined and restrained from proceeding with the assessment and collection of the tax.

If the respondent had, as petitioners contend, a plain, speedy and efficient remedy in the state courts, such action is prohibited by virtue of 28 U. S. C. A., Sec. 41 (1), which provides:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy, and efficient remedy may be had at law or in equity, in the courts of said state." (Enacted August 21, 1937.)

The respondent's action herein is an attempt to do indirectly what is prohibited by the Judicial Code. This question was discussed but not decided by this Court in *Great Lakes Dredge & Dock Company* v. *Huffman, supra,* when it said:

> "It is true that the Act of Congress speaks only of suits 'to enjoin, suspend or restrain the assessment, levy, or collection of any tax' imposed by a state law, and that the declaratory judgment procedure may be,

> and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure. */* *"

In *Spector Motor Service* v. *McLaughlin, supra,* this Court held the Johnson Act did not prevent the District Court from assuming jurisdiction and to give whatever relief was appropriate because of the uncertainty surrounding the adequacy of the Connecticut remedy involved in that case under circumstances which do not exist in the case at bar.

Several courts that have considered this question have held that such procedure is barred by the section of the Judicial Code quoted. *Collier Advertising Service, Inc.* v. *City of New York, et al.,* 32 Fed. Sup. 870 (S. D.).

In *West Publishing Co.* v. *McColgan,* 138 Fed. (2d) 320 (9th C. C. A.), a declaratory judgment suit was filed against the tax commissioner of the State of California praying that the Court declare that an assessment of income taxes against the plaintiff under the California statute be held invalid and also praying for an injunction. The prayer for injunction was abandoned. The District Court dismissed the complaint and this was affirmed by the Circuit Court of Appeals. The Court held that if a declaratory judgment were entered in favor of the plaintiff even though the prayer for injunction were denied, the effect of such a judgment would amount to a suspension of the assessment and re-

strain and enjoin the collection of the tax. The Circuit Court in its opinion said at page 325:

> "The first question is answered by the prayer of the complaint; if the relief demanded were granted, the judgment unquestionably would 'enjoin, suspend or restrain' the assessment and collection of the tax. If the State could not collect the tax because of a judgment, no one would have the temerity to deny that it was very effectively enjoined and restrained. See *Collier Advertising Service* v. *City of New York*, supra; *Helms Bakeries* v. *State Board of Equalization*, 53 Cal. App. 2d 417, 128 P. 2d 167, 170. Although the appellant apparently has abandoned its prayer for injunction, what we have said applies with equal force to either remedy sought. It is, in the circumstances, wholly unnecessary to discuss 'irreparable injury.'"

See Borchard on Declaratory Judgment, Second Edition, page 828, wherein commenting on the *Collier* case he says:

> "Yet District Judge Clancy was probably correct in refusing under the Johnson Act to take jurisdiction of a federal suit for a declaratory judgment to hold invalid the 2% New York City sales tax as applied to a purchase of 12 cents or less. * * * In so holding, the court was apparently correct, for the Johnson Act was designed to prevent federal assumption of jurisdiction to adjudicate and not merely the issuance of an injunction."

The adequacy of the remedy of the respondent in the state courts was fully discussed under Point I and will not be reiterated here.

We respectfully urge that the effect of the assumption of jurisdiction of the declaratory judgment action in this case was just as effective as if the Court in the first instance had enjoined the collector of taxes of the Township of Hillsborough from collecting the tax, and that such action is prohibited by the section of the Judicial Code cited.

POINT III

The Court erred in entering summary judgment in favor of the respondent and against the petitioners.

The Court denied the right of the petitioners to a hearing on the merits and entered summary judgment based on the affidavit of the attorney for the respondent, Shelton Pitney, Esq., and the state case law. The Court based its judgment on the ground that the taxes were assessed by resolutions without notice to the respondent and without a hearing and were, therefore, null and void under *Duke Power* v. *State Board of Tax Appeals*, *supra* (p. 112a to p. 113a).

As we have pointed out under Points I and II, it is evident that the Court assumed jurisdiction on the basis of alleged intentional discrimination and that issue has never been determined, nor have the petitioners had an opportunity to meet it. The relief the Court gave was based on a remedy available to the respondent in the state court and not one requiring the intervention of the federal court.

It is apparent that the Court was in error in finding that the respondent was entitled to judgment as a matter of law on the ex-parte record before the Court.

The affidavit filed by counsel for the respondent is in great part hearsay and in the nature of a brief and not one that would be admitted in evidence. It attempts to incorporate by reference therein certain depositions taken of members of the Tax Board who are not now, and were not at the time the depositions were taken and the summary judgment entered, parties to the action. Affidavits to be used on summary judgment shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Federal Rules of Civil Procedure, 56, sec. 1. *Person* v. *U. S.*, 112 Fed. Rep. (2d) 1, certiorari denied 311 U. S. 672.

None of the depositions referred to in the affidavit of counsel for the respondent had been offered in evidence, nor does it appear that there are any facts which would make them evidential under Federal Rules of Civil Procedure 26d.

For this reason we submit that the Trial Judge erred in considering the affidavit of counsel on the summary judgment proceeding.

There are a great many distinctions between the case at bar and *Duke Power Company* v. *State Board of Tax Appeals, supra,* on which the Trial Judge based his decision.

In the case at bar there are separate assessments levied for the years 1940 and 1941 against the respondent, Doris Duke Cromwell, individually, and as Trustee of the Duke Endowment. The Duke Endowment is a common law trust created by James B. Duke on December 11, 1924, when a resident of Hillsborough Township, New Jersey (pp. 25a to 28a). The creator of the trust, James B. Duke, died a resident of Hillsborough Township and his Will was probated and his estate administered in Somerset County, New Jersey, wherein Hillsborough Township is located. In his Will he provided additions to the aforesaid Duke Endowment and provided for its distribution to the respondent individually in the event that said trust should be held invalid, or any part thereof held invalid (pp. 57a to 59a). It is alleged in the complaint that the Duke Endowment is a charitable trust devoted exclusively to charitable purposes. This is denied in the answer and is denied that any income or corpus of the endowment is devoted to religious, charitable, benevolent or eleomosynary purposes in New Jersey and is, therefore, unexempt from taxation in the State of New Jersey.

The situs of a common law trust is the domicile of the creator at the time it is created. *Swetland* v. *Swetland*, 105 N. J. Eq. 608, 149 Atl. Rep. 50; affirmed 107 N. J. Eq. 504, 153 Atl. Rep. 907. The creation and existence of this trust is by virtue of the laws of the State of New Jersey and it receives protection and benefits by virtue of the laws of the State of New Jersey, and is a subject over which the sovereign power of the State extends and may subject to taxation. *State Tax Commission of Utah* v. *Aldrich*, 316 U. S. 174, 86 L. Ed. 1358, 62 Sup. Ct. 1008.

In the *Duke Power* case the Court found as a fact that the property was not assessable in Hillsborough Township because the identical property had been assessed and taxes paid thereon in the State of North Carolina and, therefore, the property was exempt from taxation in the State of New Jersey. R. S. 1937, 54:4-3.2.

In the case at bar no claim is made that the respondent individually or as trustee of the Duke Endowment has ever paid any tax in New Jersey or elsewhere on the property for which the assessments were levied.

Under the New Jersey Statutes there are two methods of including property omitted from the tax list. R. S. 1937, 54:3-20 provides a method for the inclusion of property omitted by the assessor and another method for the inclusion of property omitted from the assessment. When property has been omitted from assessment by the local assessor, the County Tax Board shall by resolution cause to be entered upon the tax duplicate a proper assessment and immediately give notice of such entry and of the time and place of its next meeting to the owner of the property affected. The other method is that on the written complaint of the collector or any taxpayer of the taxing district specifying property that has been omitted in the assessment, the County Tax Board on five days' notice in writing to the owner by the party complainant and after due examination and

hearing may enter the omitted property by judgment rendered within ten days after the hearing.

In the *Duke Power* case the tax was assessed for the year 1939 and the proceeding was originally instituted under the second section of the statute by giving five days' notice in writing that a hearing was to be held. On November 13, 1940, a hearing was held and on November 18, 1940, the assessment was levied on certain cash. On November 22, 1940, the County Tax Board without any notice to the Duke Power Company entered an additional assessment against it for intangible personal property omitted from the assessment of November 18th. At the next meeting of the Tax Board the attorneys for the Duke Power Company appeared before the Board and were refused a hearing. In the *Duke Power* case the Court pointed out that it was not necessary to consider the application of the remedial statutes, R. S. 1937, 54:4-58 to 54:4-60, as none of the property was liable to taxation in the Township because a tax had already been paid on the property in North Carolina and it was, therefore, exempt under the New Jersey statutes.

In the resolutions levying the assessments in the case at bar notice was given to the respondent that the next regular meeting of the Somerset County Board of Taxation would be held on July 14, 1941, at 10:30 A. M. at the Somerset County Court House, Somerville, New Jersey. It is not contended by the respondent that she, or anyone on her behalf, attended the hearing and was refused a hearing, or requested a hearing, and in fact the only presence of any one representing the respondent at that hearing was the United States Marshal and one of the respondent's attorneys, who accompanied the United States Marshal while serving the summons in the present declaratory judgment action on the members of the County Tax Board.

In the case at bar no claim for exemption was filed by the plaintiff on any of the property assessed, nor was any action taken by the respondent for a hearing or review of the assessments in the state administrative boards or Courts. The Trial Court and the Circuit Court of Appeals gave no consideration to the remedial statute which provides:

> "54:4-58. No tax, assessment or water rate imposed or levied in this state shall be set aside or reversed in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying or levying any such tax, assessment or water rate, or in the proceeding for its collection if the person against whom or the property upon which it is assessed or laid is, in fact, liable to taxation, assessment or imposition of the water rate, in respect to the purposes for which the tax, assessment or rate is levied, assessed or laid."
>
> "54:4-59. The Court in which any action, suit or proceeding is or shall be pending to review any such tax, assessment or water rate shall amend all irregularities, errors or defects, and may if necessary ascertain and determine the sum for which the person or property was legally liable and by order or decree fix the amount thereof. The sum so fixed shall be the amount of tax, assessment or water rate for which the person or property shall be liable."

The Circuit Court of Appeals held that the foregoing statutes were not applicable to these assessments. An examination of the cases construing these statutes shows clearly that they were intended to cure or remedy any irregularity or defect in assessing, laying or levying any tax. In taking this view that Court fell into error. In *Duke Power Co.* v. *State Board of Tax Appeals, supra,* the Court held it was not necessary to consider the remedial statutes because none of the property was taxable in the township where taxed. The Court by way of dicta in that

case stated that the application of the remedial statutes has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner. That this was at its best judicial dicta and an erroneous statement of the law under the cases in New Jersey, we shall point out later in the brief. However, taking the view accepted by the Circuit Court of Appeals, its judgment is erroneous because it failed to distinguish between the petitioner, Doris Duke Cromwell, as an individual and as a Trustee of the Duke Endowment. If the application of this statute was to be applied only where the property has been omitted by the assessor and not when the property has been omitted from the assessment, then the remedial statutes apply to the Duke Endowment. The assessment against the Duke Endowment made in this case was an original one as it had never been assessed before by any assessor. The omission of property from the assessment presupposes some existing assessment from which property has been omitted. This is not so as far as the Duke Endowment is concerned as at the time the assessment in the case at bar was levied there were no existing assessments, as it had never been assessed before that time.

The Courts of New Jersey have been consistent in according a broad interpretation to these statutes so that no property legally taxable in the State should escape taxation through any mistake or illegality of any kind by the taxing officials. These statutes were originally passed as Chapter 157, Laws of 1881.

In an early construction of the statute in *Conover* v. *Honce*, 46 N. J. L. 347, Chief Justice BEASLEY, speaking for the Court of Errors and Appeals, said:

> "As I read that act, its effect is to destroy, root and branch, the power to defeat such a proceeding except upon a meritorious ground. If the person or the property be not taxable, the processes of appeal

and certiorari retain their usual efficacy, but, touching forms and irregularities of procedure, they have been stripped of all force whatever. In fact, the statute, in very terms, declares that such shall be its effect."

In *Saunders* v. *Morris*, 48 N. J. L. 99 (Sup. Ct. 1886), 2 Atl. Rep. 666, an assessment had been made under a statute repealed by the constitutional amendment of 1875 requiring the taxation of property by general laws. Although the assessment was made under a void statute, the nature of the illegality there was held not to warrant the invalidation of the assessment because of this curative statute. The Court in that case said:

"Under such circumstances, the general act respecting taxes, assessments, and water rents, approved March 23, 1881 (Pamp. L. 1881, p. 194) prohibits the court from annulling taxes merely because of illegality in the assessment of the same, and makes it our duty to see that the complaining taxpayer bears his fair share of the common burden."

In *Muscanetcong Iron Works* v. *Netcong*, 90 N. J. L. 58, 99 Atl. Rep. 914, an assessment of omitted property was made by the tax collector without giving the taxpayer notice of the next meeting of the county board as required by the statute. The Supreme Court in affirming the assessment levied against the taxpayer without the notice prescribed by the statute said:

"Under section 39 of the Tax Act we are forbidden to set aside the tax for irregularity or defect in form or illegality in assessing, laying, or levying the tax, if in fact the prosecutor is liable to taxation in respect of the purpose for which the tax is levied. Such is the present case."

In *Manistee Iron Works Co.* v. *Raritan Township*, 12 N. J. Misc. 143 (Sup. Ct. 1934), 170 Atl. Rep. 39, the cura-

tive statute was applied where a local assessor assessed taxes against a corporation for the years 1926 to 1931. Discovering that the property belonged to the Manistee Iron Works and not the corporation assessed he then made penciled changes upon his records, transferring the assessments to the Iron Works. The tax remained unpaid and the property was sold for taxes and a review of the proceedings was sought. The assessment was affirmed under the curative provisions of this statute. The Court held that this legislation was not confiscatory as the owner of the property knows that it is subject to taxation and he is under a duty to make reasonable inquiry as to its taxes. On the question of the loss of the taxpayer's appeal to the County Tax Board the Court said:

> "Although the prosecutor could not appeal to the county board or other agency designed for the correction of errors, and, in fact, had no previous notice of the action taken, does not unjustly affect the prosecutor, since a review in the court affords a full and effective remedy within the purview of the organic law. The law does not require that the prosecutor shall have a right to review by the state tax board. It is sufficient that he be not deprived of his property without due process of law."

In *Ridgewood Elks Holding Corporation* v. *Village of Ridgewood*, 127 N. J. L. 295 (E. & A. 1941), 22 Atl. (2d) 266, the taxing district had entered as exempt on its tax list for 1937 and 1938 a large building owned by the taxpayer and five acres of a fourteen acre tract on which the building stood. The remaining nine acres were entered as taxable and tax bills were submitted for this and paid by the owner. Some time thereafter the tax assessor on his own volition and without any notice of the action to the taxpayer changed the tax duplicates and cancelled the exemptions originally noted and entered all of the property as taxable. Demand for the additional taxes due for the years 1938 and 1939 was not made until August, 1940, and the property was sold for

non-payment of such taxes on October 1, 1940. The Court held that the curative statute was applicable and found that the property should have been subject to such taxation in the first instance and affirmed the judgment dismissing the taxpayer's appeal.

In the case cited no demand was made for the additional tax until August, 1940. This was beyond the time which the taxing district would have had under the statute to add this property to the tax list as omitted property. Under R. S. 1937, 54:3-20, the proceedings to add omitted property must be brought within one year from the date on which taxes become a lien on real property. This time for the 1938 taxes expired on December 1, 1939, and no proceedings had been taken to add this omitted property to the tax list in accordance with the statute. It was done solely by the tax assessor on his own volition and without notice The Court in that case said:

> "Our view then is that in an attack upon a proceeding for the collection of a tax, where the invalidity claimed is one in the assessment, the quoted statute applies, and we should not set aside a sale upon the ground that the assessment was irregularly made if the property is, in fact, liable to the tax which was sought to be imposed. If the certiorari were to review the assessment itself, under R. S. 54:4-59, the court would be under the duty to correct all irregularities and errors and determine the sum for which the property was legally liable and fix the amount thereof. In any event, we think we should not set aside the sale upon a holding that the assessment was irregularly made in the face of the statutory direction that assessments shall not be voided when the property is liable for the tax levied."

It is contended by the respondent that the Remedial Statutes, 1937, 54:4-58 to 54:4-60 do not apply where the statute for the addition of omitted property is not complied with because of a statement made to that effect by the New

Jersey Supreme Court in *Duke Power Co.* v. *State Board of Tax Appeals*, 129 N. J. L. 449, 30 Atl. 2d 416, affirmed 131 N. J. L. 275, 36 Atl. 2d 201. The reference to this statute, in the opinion in *Duke Power, supra*, is mere dictum, as the Court did not consider the statute in determining the issues raised.

The Court in the *Duke Power* case said:

> "Since none of the property in question was liable to taxation in Hillsborough Township we need not consider the application of the remedial statutes. N. J. S. A. 54:4-58, 54:4-60. * * *"

It is obvious from this statement that the Court did not consider the remedial statutes referred to in the adjudication which it made. Notwithstanding this, the Court went on to say that the remedial statutes were not a substitute for proper assessment and that their application has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner, and that the remedial statutes did not apply where the procedure for the addition of property omitted from the assessment is not complied with.

That this statement is dictum and also an erroneous statement of the law as appears from the adjudications where the remedial statutes have been construed and applied can be demonstrated.

In *Crescent Ring Co.* v. *Travelers Indemnity Company*, 102 N. J. L. 85, 132 Atl. Rep. 106, the Court of Errors and Appeals in defining dictum said at page 89:

> "Obiter dictum is an expression of opinion by the court or judge on a collateral question not directly involved, or mere argument or illustration originating with him, while judicial dictum is an expression of opinion on a question directly involved, argued by counsel and deliberately passed on by the court, though not necessary to a decision. While neither

> is binding as a decision, judicial dictum is entitled to much greater weight than the other and should not be lightly disregarded."

It will, therefore, be seen that at best the statement referred to is judicial dictum and not binding as a decision on the Federal Courts although entitled to greater weight than obiter dictum, and this is so whether the statement is a pronouncement of the New Jersey Supreme Court or the Court of Errors and Appeals.

It is the petitioners' contention that, therefore, the Trial Court in the case at bar should have considered the remedial statutes and should have made an independent examination of the cases in New Jersey construing the effect of the statutes.

The statute clearly states that no tax assessment imposed or levied shall be set aside for any irregularity or defect in form or illegality in assessment if the person or property is in fact liable for the tax. It further provides the same protection up to and including the proceedings for collection of the tax.

In *Dodge* v. *Love*, 47 N. J. L. 436, affirmed 49 N. J. L. 235, the Court pointed out that the purpose of the statute is to act within its scope until all of the steps necessary in levying and collecting the public revenues have been completed. In that case the Court said:

> "The act is remedial and should be liberally construed to embrace within its scope all the steps necessarily taken in levying the public revenues. That such was the legislative purpose is manifested by the fact that its operation is expressly extended to the proceedings for the collection as well as for the assessment of taxes. It could not have been intended to exclude the intermediate steps between the initial and final procedure."

In the *Ridgewood Elks* case, *supra*, the Court of Errors and Appeals did exactly what the dictum in the *Duke Power*

case said could not be done. It applied the remedial statutes to validate a tax illegally entered as property omitted in the assessment.

In the *Duke Power* case the Court stated that property omitted by the assessor must be added to the tax list before April 1st of the taxable year. That any property added to the tax list after April 1st of the taxable year must be in accordance with the second section of R. S. 54:3-20 and added as property omitted in the assessment. This section provides for a hearing by the county tax board after a complaint has been filed and on five days' notice of the hearing to the taxpayer, and also a judgment thereafter within ten days.

In the *Ridgewood Elks* case taxes were assessed for the years 1938 and 1939. A building and five acres of land owned by the taxpayer were not included because the assessor assumed they were exempt from taxation. These taxes were paid.

On March 21, 1939, the State Tax Board handed down a decision relating to the 1937 tax voiding similar exemptions for that year. The 1938 and 1939 taxes were not involved in that case.

The only way the building and land exempted could be added to the tax list for 1938 and 1939 was in accordance with R. S. 54:3-20.

On the 1938 tax the County Tax Board was required under the statute to hold a formal hearing with due notice and the entry of a judgment.

The local assessor took it upon himself to change his tax duplicates for 1938 and 1939 by adding to the assessment the value of the previous exempt building and five acres of land. The County Tax Board did not undertake to act in any respect.

Under the statute as construed in the *Duke Power* case the local assessor had no more right to add the additional assessment than would a complete stranger.

Notwithstanding these facts, the Court of Errors and Appeals upheld the illegal assessment of property omitted in the assessment by applying the remedial statutes and held that it would not set aside a tax where the invalidity claimed is one in the assessment.

It will, therefore, be seen that the tax collector without any authority added property omitted from the assessment. The Court of Errors and Appeals in the *Ridgewood Elks* case held that the remedial statutes were applicable even though the property added had been omitted from the original assessment. This is doing the very thing which the Circuit Court of Appeals held could not be done by way of the remedial statutes.

In the *Ridgewood Elks* case, *supra*, the tax was held to be valid under the curative statute, although there were no legal proceedings taken to add the property to the tax list. This certainly is a far broader construction of the curative statute than is necessary to sustain the assessment made in this case, assuming the irregularity contended for by the respondent exists, and particularly is this so in view of the allegation of the answer of petitioners that the respondent purposely concealed the nature and extent of assets and property taxable to her individually and as trustee of the Duke Endowment.

We, therefore, submit that if the courts below, in the case at bar, had considered the remedial statutes and had made an independent examination of the cases relating to the application of the remedial statutes, it would have been clear to those Courts, that they are applicable in the situation presented here and would have validated any illegality in the assessment.

CONCLUSION

For all the reasons set forth herein, we respectfully submit that the judgment of the Circuit Court of Appeals affirming the judgment of the District Court should be reversed and the complaint dismissed, or that the judgment be reversed and the respondent be required to proceed forthwith in the state administrative bodies or courts of New Jersey for the claims asserted in the complaint.

Respectfully submitted,

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HARRY E. WALBURG,
EDWARD R. MCGLYNN,
On the Brief.

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1945

No. 305

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough,
Petitioners,

vs.

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHELTON PITNEY,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 305

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough,

Petitioners,

vs.

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions in Courts Below

The opinion of the Circuit Court of Appeals (149 F. (2d) 617) will be found beginning at p. 148 of the Record. The opinion of the District Court (56 F. Supp. 41) will be found beginning at p. 111 of the Record.

The judgment sought to be reviewed, entered on May 9, 1945, will be found at p. 155 of the Record. The Judgment of the District Court, entered on August 7, 1944, will be

found at p. 114 of the Record. The petition for certiorari was filed August 9, 1945.

Jurisdiction

The petitioners seek to invoke the jurisdiction of this Court under Sec. 347 of Title 28 in the United States Code.

Questions Involved

1. Did not the District Court properly assume jurisdiction of a declaratory judgment action because of the alleged intentional and fraudulent tax discriminations for which the law of New Jersey does not furnish an adequate remedy, and thus follow the decision of this Court in *Spector Motor Service, Inc.* v. *McLaughlin, Tax Commissioner*, 323 U. S. 101, which decision had interpreted *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293?

2. Did not the District Court, on the uncontroverted identity of the procedure in this case with the procedure held invalid in *Duke Power Co.* v. *State Board of Taxation*, 129 N. J. L. 449 (Sup. 1943) 30 A. 2d 416, affirmed 131 N. J. L. 275 (E. & A. 1944) 36 A. 2d 201, properly grant a summary judgment on State grounds?

Statement

Respondent brought this suit under the Federal Declaratory Judgments Act (Sec. 274(d) of the Judicial Code, 28 USCA 400) on July 14, 1941, asking for a judgment declaring four assessments wholly invalid and void on various grounds, including the ground that each of the assessments was intentionally and fraudulently discriminatory and as such violative of the Equal Protection Clause of the Fourteenth Amendment and that she was without

adequate remedy therefor under the laws of New Jersey (Par. 41 of the Complaint; p. 32)*, and on the further ground that there had been no compliance with the pertinent part of Sec. 54:3-20, R. S. N. J. 1937, requiring five days' notice in writing, due examination and hearing, and rendition of judgment thereon, where property omitted in the assessment is added after April first of any tax year. See Pars. 7, 28, 29 of the Complaint (pp. 9, 23).

The only material fact in this case is that the procedure followed by the taxing authorities and the tax ferret, one Alfred L. Kirby, who has a contingent interest in any taxes recovered, before the Somerset County Board of Taxation in this case is identical with the procedure followed by these same taxing authorities and this same tax ferret, with a similar contingent interest, before the same Board of Taxation in *Duke Power Co. v. State Board of Taxation*, 129 N. J. L. 449 (Sup. 1943) 30 A. 2d 416, affirmed 131 N. J. L. 275 (E. & A. 1944) 36 A. 2d 201, in which case the highest courts of New Jersey held that assessments based on such procedure were absolutely null and void. This fact has never been controverted by the petitioners and is, in fact, admitted in the Petition at page 13, where petitioners state that the *Duke Power Co. Case* was "under facts almost identical with facts herewith presented." This procedure is fully alleged by Petitioners (see Complaint, Pars. 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28; pp. 15-23) and is admitted by the Answer and therein defended on the basis of petitioners' interpretation of Sec. 54:3-20, R. S. N. J. 1937, which interpretation these same

*Page references are to the Transcript of Record unless otherwise noted.

petitioners were at that time urging on the courts of New Jersey in the *Duke Power Co. Case* and which was completely rejected and repudiated by the highest courts of New Jersey in that case (see Answer, Pars. 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28; pp. 53-5).

This is a litigation solely between Hillsborough Township, having an annual budget for each of the two tax years in question of less than $100,000 (pp. 29-30, 60) and the above-mentioned tax ferret, who has a contingent interest in any recovery (pp. 33-4, 90), and the respondent, a non-resident taxpayer of said Township, whereby said Township seeks to collect additional taxes of over $13,000,000 for said two years (Complaint, Pars. 36-9, pp. 30-1; see also pp. 129-36).

The State of New Jersey would not receive one penny of any tax collected hereunder. *Green* v. *Passaic County Board of Taxation*, 131 N. J. L. 13, 17 (Sup. 1943) 34 A. 2d 245, 247. Moreover, New Jersey by a recent statute (Chap. 163 of the Laws of 1945, approved April 13, 1945) eliminated the old *ad valorem* personal property tax on intangible personal property, thus precluding any similar "tax lightning" attempts on that type of property. The decision in this case, therefore, sets no precedent of future import.

ARGUMENT

I. The Federal Jurisdiction

It is now well settled that in a declaratory judgment action dealing with State taxes Federal Courts shall entertain or deny jurisdiction upon established equitable principles. See: *Great Lakes Dredge & Dock Co.* v. *Huffman*,

319 U. S. 293; *Spector Motor Service, Inc.* v. *McLaughlin, Tax Commissioner*, 323 U. S. 101.

In the latter case, relied on by the Court below but not called to this Court's attention by petitioners' Brief, which was a suit for a declaratory judgment with injunction in a United States District Court to declare void or inapplicable certain Connecticut taxes, the opinion by Mr. Justice Frankfurter said:

> "The District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate despite the Johnson Act * * * and *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 87 L. ed. 1407, 63 S. Ct. 1070, because of the uncertainty surrounding the adequacy of the Connecticut remedy."

The *Great Lakes Case* had plainly indicated that the construction placed upon it by the *Spector Motor Service Case* was that intended, as that opinion said:

> "Called upon to adjudicate what is essentially an equitable cause of action, the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds. The Declaratory Judgments Act was not devised to deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles" (319 U. S. at 300).

The charges of intentional and fraudulent discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, set forth in Pars. 41-2 of the Complaint (pp. 32-4), that plain-

tiff was singled out "for a method and basis of taxation different from that accorded other taxpayers", in that the four assessments are entirely on intangible personal property alleged to be owned by the respondent individually and as Trustee, and that those charged with the duty of assessing in said County and Township "have consistently, systematically, intentionally and notoriously failed to assess at true value, or at all, the intangible personal property owned by taxpayers" for the tax years in question, bring this case squarely within that class of cases cited by Chief Justice Hughes in *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 28-9, where it was said:

> "It is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property. *Sunday Lake Iron Co.* v. *Wakefield Twp.* 247 U. S. 350, 62 L. ed. 1154, 38 S. Ct. 495, *supra*; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. ed. 340, 28 A. L. R. 979, 43 S. Ct. 190, *supra*; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 52 L. ed. 78, 28 S. Ct. 7, 12 Ann. Cas. 757, *supra*; *Chicago G. W. R. Co.* v. *Kendall*, 266 U. S. 94, 69 L. ed. 183, 45 S. Ct. 55, *supra*."

In an unbroken line of opinions, dating back as far as 1856, of which the latest are *Royal Mfg. Co.* v. *Board of Equalization of Taxes*, 76 N. J. L. 402, 404-5 (Sup. 1908), 70 Atl. 978, affirmed 78 N. J. L. 337, 338 (E. & A. 1909), 74 Atl. 525, *Pennsylvania Coal Co.* v. *Saddle River*, 96 N. J. L. 40, 43 (Sup. 1921), 114 Atl. 157, 158, *Hackensack Water Co.* v. *State Board (Woodcliffe Lake)*, 104 N. J. L. 48, 49-50 (Sup. 1927), 139 Atl. 410, 411, and

Lehigh Valley R. R. Co. v. *State Board*, 12 N. J. Misc. 673, 675 (Sup. 1934), 174 Atl. 359, 360, the courts of New Jersey have held that a taxpayer who has been singled out for discriminatory taxation under the General Tax Act is restricted to statutory proceedings against the other members of his class for the purpose of raising them to his level, that he may not obtain a reduction of his own assessment to the level of the assessments imposed upon other taxpayers of his class, and in the trial of his own tax appeal may not even introduce evidence of the discrimination. Accordingly, we have the very situation of intentional and fraudulent discrimination without adequate remedy presented to this Court in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441. See, also: *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23; *Iowa-Des Moines Natl. Bank* v. *Bennett*, 284 U. S. 239.

The case of *Central R. Co.* v. *Martin, State Tax Commissioner*, 112 N. J. L. 5 (E. & A. 1933); 169 Atl. 489, relied on by petitioners, is not in point. It involved no claim of discrimination within a single class of taxpayers. It did not arise under the General Tax Act and involved no question of confining the taxpayer to proceedings against his fellow taxpayers under R. S. N. J. 54:3-21. It was decided before *Lehigh Valley R. R. Co.* v. *State Board*, *supra*, and the opinion in that latest pronouncement was written by the *same* Justice who wrote the *Central R. Co.* v. *Martin* opinion relied on by petitioners. That Justice in writing his later opinion (which arose under the General Tax Act because the particular property taxed was not used for railroad purposes) did not cite his earlier opinion in the *Central R. Co.* v. *Martin Case* (which arose under the Railroad Tax Act). On the contrary, he cited the

Royal Mfg. Co. Case as having "established" the New Jersey law and with *Hackensack Water Co.* v. *Woodcliffe Lake, supra,* as being "controlling", in spite of the *Sioux City Bridge Co. Case*.

II. The Decision on State Grounds

The Federal equity jurisdiction existing by reason of the tax discrimination without adequate New Jersey remedy therefor gave the District Court the right and duty of disposing of this case on a well settled ground of State law rather than Constitutional grounds and the argument of petitioners (Brief in Support of Petition, p. 18), that the District Judge in deciding the case on State grounds "conceded that, therefore, it was apparent that there was an adequate state administrative and legal remedy," runs squarely counter to the established principles of equity, as set forth in the cases cited below.

In *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 191, a Federal suit in equity to enjoin State rates on the ground that they were unauthorized by the State and violated the Federal Constitution with no adequate remedy therefor, the Court held that these allegations gave Federal equity jurisdiction and thereby

> "the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

In *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 387-8, Chief Justice (then Mr. Justice) Stone said:

> "As our decision in these cases turns on the construction and application of the state law, we do not pass upon the constitutional questions raised. [Citing cases.] They are, however, questions of substance and sufficient to give the court jurisdiction to pass on the whole case. [Citing cases.]"

See, also: *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 508; *Chicago Great Western Ry. Co.* v. *Kendall*, 266 U. S. 94, 97-8; and *Meredith* v. *City of Winterhaven*, 320 U. S. 228, 237 (a declaratory judgment action).

The opinion of the Circuit Court of Appeals by Goodrich, J., properly held:

> "The plaintiff's complaint alleged facts which showed a violation of the right set out by the Supreme Court in the *Sioux City Bridge case*. Appeal to the state courts, as shown in the state decisions cited, shows that such appeal would be unavailing to protect a constitutional right. Under those circumstances, the state procedure is not speedy, efficient or adequate. *Union Pacific Railroad Company* v. *Board of County Commissioners of the County of Weld, State of Colorado, et al.*, 247 U. S. 282 (1918); *Dawson, Attorney General of the State of Kentucky et al.*, v. *Kentucky Distilleries & Warehouse Company*, 255 U. S. 288 (1921). We conclude that the jurisdiction of the federal court in a declaratory judgment suit was properly invoked. See *Spector Motor Service* v. *McLaughlin, Tax Commissioner*, [323] U. S. [101], 65 Sup. Ct. Reporter 152 (1944).
>
> "The point upon which the plaintiff won, in the District Court, was not the constitutional question, but that of the invalidity of the assessment under New Jersey law. This is shown in the plaintiff's motion for judgment and the opinion of the court

> in granting it. Since the foundation for federal jurisdiction existed, however, that jurisdiction continued for the settlement of the controversy 'even though [the court] * * * decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only'. *Siler et al. v. Louisville & Nashville Railroad Company*, 213 U. S. 175, 191 (1909)"; (citing other cases referred to above) 149 F. (2d) 620.

For its affirmance of the District Court's judgment that "The said resolutions and subsequent proceedings thereon by the Township of Hillsborough are therefore null and void" the Circuit Court of Appeals relied on New Jersey law as interpreted in the decision in *Duke Power Co. v. State Board of Tax Appeals*, 129 N. J. L. 449 (Sup. 1943) 30 A. 2d 416, affirmed 131 N. J. L. 275 (E. & A. 1944), 36 A. 2d 201, which case petitioners admit was "under facts almost identical with facts herewith presented" (Petition, p. 13). That case was decided by the Supreme Court in an opinion by Mr. Justice Bodine and affirmed in the Court of Errors and Appeals "for the *reasons* expressed in the opinion by Mr. Justice Bodine in the Supreme Court" (italics supplied). These reasons were expressed by the conclusion of the opinion, as follows:

> "Since the property assessed was not subject to taxation and since the procedure before the State Board was no substitute for a proper proceeding before the County Board, the assessment is set aside and the judgment is reversed" (129 N. J. L. 457, 30 A. 2d 420);

thus clearly basing the decision both on an improper proceeding before the County Board and on the tax exemption.

And of course he had a perfect right to thus base his decision on two grounds. See *United States of America v. Title Ins. & Tr. Co.*, 265 U. S. 472, 486; and cases there cited.

As Judge Goodrich said (149 F. (2d) 621):

> "We see not the slightest reason for supposing that the Court did not mean just what is said when it rested its decision on both points."

The fact that this decision was squarely based on the improper procedure before the County Board makes untenable petitioners' contention (Brief, p. 33 et seq.) that that portion of the opinion of the New Jersey Supreme Court dealing with the so-called remedial statutes (R. S. N. J. 54:4-58.9) was dictum, as obviously the Court could not have thus based its decision had it considered the remedial statutes applicable. This is further shown by the fact that the Court overruled the holding by the State Board of Tax Appeals (*Duke Power Co.* v. *Hillsborough Township*, 20 N. J. Misc. 240 (1942), 26 A. 2d 713) that these remedial sections were applicable, and in so doing said:

> "* * * the remedial statutes we do not find to have been a substitute for proper assessment. * * * they do not apply where the statute for the addition of property omitted from the assessment is not complied with." (129 N. J. L. 449, 457, 30 A. 2d 416, 420).

Petitioners' contention that the New Jersey Courts erred in holding the remedial sections inapplicable and in overruling the State Board on that point is obviously unavailing, as even if the State Courts had failed to follow earlier State precedents, which we strenuously deny, neither the District Court nor the Circuit Court of Appeals could have

disregarded the latest pronouncement of the highest court of New Jersey on a case on all fours with the case before them. *Erie R. R.* v. *Tompkins,* 304 U. S. 64. The argument advanced by petitioners here is exactly the same argument advanced by this same Township in the *Duke Power Co. Case* and rejected by the New Jersey Courts. The authorities relied on by the petitioners are the same authorities relied on for that purpose in the *Duke Power Co. Case,* where they were wholly uninfluential. They are distinguished by their facts and fall outside the long established rule that the remedial statutes do not apply to give life to assessments found to be absolutely void *ab initio* (*App* v. *Stockton,* 61 N. J. L. 520 (Sup. 1898); *Canda Mfg. Co.* v. *Woodridge,* 58 N. J. L. 134 (Sup. 1895); *Peckham* v. *Newark,* 43 N. J. L. 576 (Sup. 1881); *Mitsch* v. *Township of Riverside,* 86 N. J. L. 603 (E. & A. 1914), 92 Atl. 436; *Shillingsburg* v. *Township of Greenwich,* 83 N. J. L. 179 (Sup. 1912), 83 Atl. 644) and does not operate to confer original power to tax or assess. See: *Reynolds* v. *Paterson,* 49 N. J. L. 380 (Sup. 1887); and *Oradell* v. *State Board,* 125 N. J. L. 37 (E. & A. 1940), 13 A. 2d 479, where the Court said (125 N. J. L. at p. 40, 13 A. 2d at p. 480):

> "If, for lack of jurisdiction, the County Tax Board could not lawfully proceed to hear and determine the cause on the merits, so also was the State Board of Tax Appeals under a like disability."

Mr. Justice Bodine's reason for holding void the identical procedure utilized before the County Board in the *Duke Power Co. Case* was stated by him in the following language:

> "The procedure adopted in this case was not in accordance with the statute. Property omitted by

> the assessor must be added before April 1st, so that the rate of taxation may be determined. Thereafter, the addition of property omitted from the assessment must be in accordance with the part of the statute first [*] quoted. *Mitsch* v. *Riverside*, 86 N. J. L. 603; *Shillingsburg* v. *Greenwich*, 83 Id. 129." (129 N. J. L. 455, 30 A. 2d 420).

And it is admitted by the Answer that the assessments in question were made after April first of each of the tax years in question and that that part of the statute which Mr. Justice Bodine said must be followed after that date was not followed in the instant case and the five days' notice, due examination and hearing, and judgment rendered within ten days after the hearing were not granted to the plaintiff herein. See Answer, Pars. 17, 18, 19, 20, 21, 22, 23[**], 24, 25, 26, 27, 28, 29, 34; pp. 53-6, 60.

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[*] The part of the statute first quoted was quoted in the opinion as follows, with the italics supplied by the Court:

"On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on *five days'* notice in writing to the owner by the party complaining, and after *due examination and hearing*, may enter the omitted property on the duplicate *by judgment rendered within ten days* after the hearing * * *. *Such proceeding may be brought within one year from the date when taxes on real property become a lien.*"

[**] Petitioners' allegation in Par. 23 of Answer that "plaintiff, through her counsel, did appear at the meeting of the Somerset County Board of Taxation" has been repudiated by admission of counsel: "The Respondent did not appear at this meeting, but instituted the declaratory judgment action on that day"; and "The Respondent in this case did not attend at the hearing of the County Tax Board subsequent to the receipt of certified copies of the resolutions levying the tax"; Petition and Brief in support, pp. 5 and 42.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 305

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J. and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough,

Petitioners,

vs.

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment,

Respondent.

BRIEF FOR RESPONDENT

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On the Brief

December 7, 1945

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough, *Petitioners,* *vs.* DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment, *Respondent.*	No. 305

BRIEF FOR RESPONDENT

This is a review, on writ of certiorari, of a judgment of the United States Circuit Court of Appeals for the Third Judicial Circuit (R. 155), affirming a declaratory judgment of the United States District Court for the District of New Jersey (R. 114), which adjudged that assessments of personal property taxes against respondent, individually and as trustee of the Duke Endowment, for the tax years 1940 and 1941 were wholly null and void.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 148) is reported in 149 F. (2d) 617; and the opinion of the

District Court (R. 111) is reported in 56 F. Supp. 41. An earlier opinion of the United States District Court denying a motion to dismiss the action will be found at R. 74.

JURISDICTION

In the petition for certiorari the jurisdiction of this Court was invoked under Section 347 of Title 28 of the United States Code (Section 240 of the Judicial Code as amended). In their brief on the merits, petitioners rest the jurisdiction of this Court on Section 344(b) of Title 28 of the United States Code (Section 237(b) of the Judicial Code as amended).

STATEMENT

This is an action brought by respondent under the Declaratory Judgments Act (Sec. 274(d) of the Judicial Code, 28 USC 400) to have declared null and void certain assessments on intangible personal property entered for the years 1940 and 1941 by the Collector of Hillsborough Township, Somerset County, New Jersey, against her both individually and as trustee of the Duke Endowment, calling for tax payments of nearly $7,000,000 for each year, as compared with the Township's total budget of something under $97,000 per year.

The system of tentative listing of property for assessment and of assessment of personal property taxes, as prescribed by the Revised Statutes of the State of New Jersey, which is referred to repeatedly in this statement of facts as well as in the argument, is as follows:*

*The full text of all sections of the Revised Statutes of New Jersey cited in this brief appear in the Appendix.

Property is assessed for each year with reference to the amount owned on October first of the previous year (R.S.N.J. 54:4-1, 12, 23 and 24). Each taxing district, by its agent for that purpose, the "assessor", prepares a list of taxable property (commonly referred to in New Jersey as "ratables"), and is required to complete the list by the January 10th following and on that date to file with the County Board of Taxation of the county in which the taxing district is located the complete list, together with a copy thereof known as the "Assessor's Duplicate", for examination, revision and correction by the Board (R.S.N.J. 54:4-35). The County Board receives the lists and duplicates from the several taxing districts and is required "after investigation" to "revise, correct and equalize the assessed value of all property in the respective taxing districts, increase or decrease the assessed value of any property not truly valued, add to the lists and duplicates any property which has been omitted or overlooked at its true value, and in general do everything necessary for the taxation of all property in the county equally and at its true value" (R.S.N.J. 54:4-46, 47). The County Board is further required "on or before April first in each year" to "cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes assessed, to be delivered to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record" (R.S.N.J. 54:4-55).

As will appear from the ensuing argument (Point II) this delivery "on or before April first in each year", as prescribed in Section 54:4-55, constitutes the making of the assessment; and, within the meaning of Section 54:3-20, about to be quoted, prior to such delivery on April 1 an

omission of any property is classified as an omission "by the assessor", covered by the first two sentences of the section; whereas after such delivery on April 1, the omission is classified as an omission "in the assessment", covered by the third sentence of the section.

R.S.N.J. 54:3-20 is entitled "Assessment of omitted property". This section had its origin in Pamphlet Laws 1848, page 230, which had enacted different procedures for property "omitted by the assessor" and property "omitted in the assessment", in separate and distinct sections, which were combined in the present form by the General Tax Revision of 1903, P.L. 1903, page 412, sec. 28, from which, by later revisions, there came the present R.S.N.J. 54:3-20. The first two sentences of Section 54:3-20, which were derived from the first section of the original 1848 statute, read as follows:

> "The county board of taxation shall, by resolution, cause to be entered upon the tax duplicate a proper assessment against any property omitted by the assessor. The board shall then give immediate notice of such entry and of the time and place of its next meeting to the owner of the property affected, and furnish a copy of the entry to the clerk or collector of the taxing district, who shall enter it on his tax list."

The third sentence, which was derived from the second section of the 1848 statute, provides:

> "On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining, and after due examination and hearing,

> may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing, a transcript whereof shall be furnished by the board to the collector, who shall amend his duplicate accordingly. * * *"

On June 26, 1941, and so after April 1 of each of the tax years involved, 1940 and 1941, and after the assessments for those years had been made, the Somerset County Board of Taxation adopted four resolutions, which were in substance identical. Each recited a written application made "by Christopher G. Horner, a resident and taxpayer of the taxing district of the Township of Hillsborough in the County of Somerset and the duly authorized Collector of Taxes for said Township", whereby it appeared that "certain intangible personal property owned by" respondent was taxable in the taxing district and was "entirely omitted from assessment" by the Township. Each resolution purported to adjudge and determine that respondent was on October 1 of the year prior to the tax year in question a resident and inhabitant of Hillsborough Township and that taxable and intangible property in the amount stated was on such October first "entirely omitted by the Assessor of Hillsborough Township from the assessment of property in said Township" for such tax year; that the omitted property in the stated amount "be and the same is hereby assessed against" respondent, and "is hereby ordered to be entered on the tax duplicate of Hillsborough Township" for such tax year. It was further resolved that "immediate notice of the entry of this assessment" be given to respondent by the mailing of the resolution "together with a notice of the time and place of the next regular meeting of this Board" to be held on July 14, 1941; and that a certified copy of the resolu-

tion be furnished to the Collector of Taxes of Hillsborough Township "with direction that he enter upon the tax duplicate of said Township the said amount hereby assessed" (Exs. 2, 3, 5 and 6 annexed to Complaint, R. 37-48, and Pars. 18-22 of Complaint, R. 15-18, admitted in like-numbered paragraphs of Answer, R. 53-54).

On the following day, June 27, 1941, the secretary of the Somerset County Board of Taxation sent two letters to respondent, one addressed to her individually and enclosing copies of the resolutions Exhibits 2 and 3 above referred to, and the other addressed to her as Trustee of the Duke Endowment, enclosing copies of the resolutions, Exhibits 5 and 6 (Exs. 1 and 4 to Complaint, R. 36, 42, and Pars. 18-20 of Complaint, R. 15-16, admitted in like-numbered paragraphs of Answer, R. 53).

Also pursuant to the resolutions and assessments thereby made and directed, petitioner Horner, as Collector of Hillsborough Township, wrote to respondent on June 30, 1941 two letters in identical form, one addressed to her individually and the other to her as Trustee of the Duke Endowment, reading as follows:

> "Enclosed please find tax bills for personal property taxes in accordance with assessment determined and fixed by the Somerset County Board of Taxation for the taxing years of 1940 and 1941.
>
> "Please take notice that interest and penalty at the rate of 6% per annum are running from the date of this bill.
>
> "Please take further notice that this letter is a formal demand for payment of the within bill forthwith and unless payment is received accordingly, I will be obliged to proceed pursuant to law."

The tax bills referred to in and enclosed with these letters are Exhibits 7-14 attached to the complaint, R. 48-49, 129-

136 (Complaint, Pars. 24, 25, R. 18-21, admitted in like-numbered paragraphs of Answer, R. 54).

The total amount of taxes required to be raised by the Township of Hillsborough, for State, County and Township purposes, was $96,775.20 for 1940 and $96,726.44 for 1941. Apart from the additional assessments against respondent here in question, the net assessed valuation for taxation of all property assessed, both real and personal, in the Township, amounted to $3,117,863 for 1940 and $3,139,020 for 1941, resulting in a tax rate of 3.12% for 1940 and 3.10% for 1941. (Complaint, Pars. 35, 36, R. 29-30, admitted by like-numbered paragraphs of Answer, R. 60). The attempted additional assessments against respondent embodied in the resolutions and tax bills above referred to would have increased the valuation of the Township tax ratables by $221,940,438 for each of the tax years 1940 and 1941, but would not have affected the above tax rates, because under the law they had already been irrevocably fixed on April 1 of each year*. The taxes purported to be levied against respondent aggregated $6,924,541.65 for 1940 and $6,880,153.57 for 1941, computed at the above tax rates of 3.12% and 3.10%. The above is graphically shown by the following table:

	Taxing Year 1940	Taxing Year 1941
Township Ratables	$ 3,117,863.00	$ 3,139,020.00
Additional Assessment against Respondent individually and as Trustee	221,940,438.00	221,940,438.00
Township Budget	96,775.20	96,726.44
Additional Taxes levied against Respondent individually and as Trustee on above assessments	6,924,541.65	6,880,153.57

*_Musconetcong Iron Works_ v. _Borough of Netcong_, 90 N. J. L. 58, 99 Atl. 914 (Sup. Ct. 1917).

Respondent commenced the instant action for declaratory judgment on July 14, 1941 (R. 1). The relief asked (R. 35) was a judgment declaring that the purported assessments were wholly invalid and void, in contravention of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and also in contravention of the provisions of the applicable statutes of New Jersey.

The two Federal grounds alleged were: (1) that respondent was a non-resident of New Jersey and the situs of the common law trust known as the Duke Endowment, of which respondent was only one of a board of fifteen trustees, was outside of New Jersey (Complaint, Pars. 30-33, R. 24-28); and (2) that the taxing authorities of the Township of Hillsborough and of the other taxing districts of the County and State had consistently, systematically, intentionally and notoriously failed to assess at true value, or at all, any intangible personal property owned by any other taxpayers, but had deliberately singled out respondent to impose upon her a discriminatory burden of taxation grossly disproportionate to the taxes imposed upon other taxpayers, for which discrimination she was without remedy under the laws and decisions of New Jersey (Complaint, Par. 41, R. 32-33).

The State ground alleged was that there was total lack of compliance by petitioners with the requirements of the third sentence of Section 54:3-20 of the New Jersey Revised Statutes relating to the addition of property "omitted in the assessment", in that the five days' notice to the owner and the due examination and hearing stated therein as a pre-requisite to the entry of the omitted property on the duplicate were not given (Complaint, Pars. 28, 29, R. 23).

Denials in the answer of the paragraphs of the complaint stating the two Federal grounds raised issues of fact. The State ground, on the other hand, raised questions of law only, since the facts appear on the face of the papers admitted by the answer; the purported denials in Paragraphs 28 and 29 of the answer (R. 55-56) contain no denials of any factual matter but merely argue that the first two sentences of R.S.N.J. 54:3-20, set forth above, govern this proceeding.

Upon the filing of the answer in September 1941, respondent proceeded with diligence to give notice of the taking of depositions and to take depositions on the issues of fact pertaining to the Federal grounds (R. 2-4, 124-125). On the issue of intentional discrimination due to a systematic practice of not assessing other taxpayers on intangible personal property, respondent took the depositions of petitioner Horner, Collector of Taxes of Hillsborough Township; of Charles V. N. Davis, the Assessor of Hillsborough Township; of William Lifgren, W. W. Davenport, Jr., and Angelo Soriano, the members of the Somerset County Board of Taxation who adopted the resolutions; of Edward Lindstrom and J. Irving Stryker, a majority of the members of the Township Committee of Hillsborough Township; of Everest L. Belli, a former member and President of the County Board; of assessors of every taxing district in Somerset County; and of two former assessors of such a taxing district (Affidavit of Shelton Pitney, Par. 16, first paragraph, R. 105-106*).

*The affidavit of Mr. Pitney is uncontroverted. Petitioners contend that it does not conform to Rule 56(e) of the Rules of Civil Procedure that affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence and show affirmatively that affiant is competent to tes-

Before the instant case was brought to trial the case of *Duke Power Co.* v. *State Board of Tax Appeals* was decided by the Supreme Court of New Jersey in favor of the Duke Power Company on February 10, 1943 (129 N. J. L. 449, 30 A. (2d) 416), and on March 9, 1944 that decision of the Supreme Court was affirmed *per curiam* by the Court of Errors and Appeals, the highest court of New Jersey, "for the reasons expressed in the opinion delivered by Mr. Justice Bodine in the Supreme Court" (131 N. J. L. 275, 36 A. (2d) 201). The facts of the *Duke Power Company* case were as follows:

On August 16, 1939, the Township of Hillsborough, acting by petitioner Horner as Collector, filed with the Somerset County Board of Taxation its written complaint, of which it gave the Power Company the five days' notice in writing required by the third sentence of R.S.N.J. 54:3-20, alleging that some cash and other intangible property belonging to the Power Company on October 1, 1938 had been wholly omitted in the assessment for the taxing year 1939 and demanded that the Board enter that property for assessment for the taxing year. On the motion of the Power Company the Board struck from the complaint for insufficient description all property items except the

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tify to the matters stated therein. The Circuit Court of Appeals held (R. 155) that "portions" of the affidavit do not conform to the rule. We have in this brief, as we did below, limited our references to the affidavit to the portions which do conform. Mr. Pitney, as the member of the firm of Pitney, Hardin & Ward who has been from the inception of this action in charge thereof and thoroughly familiar with its facts, pleadings and proceedings (R. 85), is clearly competent to give evidence that these depositions were taken. We do not rely upon the contents of the depositions or upon any reference to those contents found in that affidavit.

cash. The Board heard the cash item on November 13, 1940 and on November 18, 1940 adopted a resolution whereby the cash was entered for assessment by the Township. Four days later, on November 22, 1940, on another application (described by Mr. Justice Bodine as a "complaint", 129 N. J. L., p. 455, 30 A. (2d), p. 419) by Collector Horner, without any notice to the company, the County Board adopted a resolution amending the previous assessment for the cash so as to include various other categories of intangibles and so bring up the total assessment for the taxing year 1939 to the sum of $21,953,125. This resolution also provided that a certified copy be given the Collector of the Township and that a like copy be sent to the Power Company with immediate notice of the entry of the amended assessment and of the time and place of the next meeting of the County Board on Monday, December 2, 1940; all of which was accordingly done.

From this it will be seen that the procedure adopted by the taxing authorities with respect to the amended assessment of $21,953,125 on November 22, 1940 was identical with the procedure pursued with respect to the attempted assessments against respondent in the instant case and that the two cases are on all fours on the State ground of noncompliance by the taxing authorities with the requirements of the New Jersey statutes (see, also, affidavit of Shelton Pitney, Pars. 11, 12; R. 95, 101*). Petitioners do not in their brief point to any material difference between the pro-

*Mr. Pitney is a competent witness with respect to the proceedings in the *Duke Power Co.* case. His firm, Pitney, Hardin & Ward, was counsel for the Duke Power Company from the inception of that litigation and Mr. Pitney was throughout the member of the firm in active charge of the litigation and was familiar with the facts, pleadings, issues and decisions (R. 95).

cedure used in the instant case and that used in the *Duke Power Company* case. In fact, petitioners in their petition for certiorari (p. 13) state that the *Duke Power Company* case was "under facts almost identical with facts herewith presented".

The *Duke Power Company* case held that the procedure under the first two sentences of R.S.N.J. 54:3-20 applies only in the period from January 10 to April 1 of each year during which the county boards, under R.S.N.J. 54:4-35 to R.S.N.J. 54:4-55, revise, correct and equalize tax lists filed by the several taxing districts of the county, and that after April 1 property overlooked and not listed by the taxing district and not added by the County Board during the period from January 10 to April 1 is property omitted "in the assessment", and may be assessed only in the manner prescribed by the third sentence of R.S.N.J. 54:3-20.

The case further held that an assessment improperly made after April 1 by County Board action under the first two sentences cannot be corrected under the so-called remedial statutes referred to in petitioners' brief (R.S.N.J. 54:4-58 and R.S.N.J. 54:4-59), because those statutes do not apply where the procedure prescribed by the third sentence of R.S.N.J. 54:3-20 for assessment of property "omitted in the assessment" has not been followed.

Upon the authority of the *Duke Power Company* case respondent, on March 14, 1944, made a motion for summary judgment on the ground of non-compliance with the third sentence of Section 54:3-20. Petitioners, on March 31, 1944, made a cross motion to dismiss the complaint on the grounds (1) that the alleged cause of action in the complaint is not within the jurisdiction of the United States District Court, (2) that the Court in appropriate exercise

of its discretion should not entertain the jurisdiction and (3) that respondent has a plain, adequate and complete remedy in the administrative bodies and in the courts of New Jersey (R. 109-110). District Judge Fake disposed of both motions in an opinion (R. 111-113) upon which judgment was entered on August 7, 1944, denying petitioners' motion to dismiss and granting respondent's motion for summary judgment on the State ground (R. 114-116). It was accordingly not necessary to try or adjudicate the Federal grounds stated in the complaint.

The judgment of District Judge Fake was unanimously affirmed by the Circuit Court of Appeals in an opinion by Circuit Judge Goodrich, filed May 9, 1945, on which judgment was entered the same day. That is the judgment now under review.

QUESTIONS PRESENTED

1. Did the District Court have jurisdiction to entertain this action because of the substantial Federal question relating to discrimination and the absence of an adequate remedy in the courts of New Jersey? And was its granting of relief on the State ground, after the law of New Jersey thereon had been established by the *Duke Power Company* case, a sound exercise of that jurisdiction?

2. Did the District Court in granting a summary judgment on the State ground correctly construe and apply the law of New Jersey as enunciated by its highest courts in the *Duke Power Company* case?

SUMMARY OF ARGUMENT

The District Court had jurisdiction of this action by reason of the presentation in the complaint of a substantial Federal question. It was alleged that the assessing and taxing authorities of New Jersey have consistently, systematically, intentionally and notoriously failed to assess at true value, or at all, the intangible personal property owned by taxpayers generally and have deliberately singled out respondent for taxation on such property, thus laying upon her a discriminatory burden. That such discrimination is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution is established by a long line of decisions of this Court.

The jurisdiction was not affected either by the amendment of August 21, 1937 to the Johnson Act, or by the equitable rule followed by this Court in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943), because there was no adequate remedy in the administrative agencies or courts of New Jersey for relief from such unconstitutional discrimination. Under New Jersey law one discriminatorily taxed upon the full value of his property, by reason of intentional and systematic undervaluation by State officials of taxable property belonging to other owners, has no right to have his assessment reduced to a parity with those of such others; and he is not even permitted to introduce evidence of the discrimination before the administrative agencies or courts. The only remedy accorded to the taxpayer discriminated against by the tax statutes of New Jersey and the decisions construing them is to apply to the administrative agencies to have the assessments on the undervalued property of such other owners raised.

That so-called remedy has been held by this Court in a long line of decisions to be no remedy at all for the invasion of the complaining taxpayer's right under the Fourteenth Amendment. But the New Jersey courts have expressly declined to follow these decisions of this Court.

At the time the complaint herein was filed, the law of New Jersey was not clear on the State ground presented in the complaint, that the purported additional assessments against respondent were null and void under Section 54:3-20 of the Revised Statutes of New Jersey. No New Jersey case had expressly held that the procedure provided by the first two sentences of that section relating to property omitted "by the assessor" was not applicable to an attempt after April 1 of the tax year to assess property omitted "in the assessment" without compliance with the requirements of the third sentence thereof of five days' prior notice to the taxpayer and due examination and hearing. And the State law as to whether, even if in such case the procedure prescribed in the third sentence of Section 54:3-20 was exclusive, the failure to follow it could be disregarded in view of the so-called remedial statutes (R.S. N.J., Sections 54:4-58 and 54:4-59) was not clear.

During the pendency of the action all of these questions of State law were authoritatively resolved by the decisions of the New Jersey Supreme Court and Court of Errors and Appeals in the case of *Duke Power Company* v. *State Board of Tax Appeals*, 129 N.J.L. 449, 30 A. (2d) 416 (Feb. 10, 1943); 131 N.J.L. 275, 36 A. (2d) 201 (March 9, 1944). That case held comprehensively, on an indistinguishable state of facts, that, in the case of an assessment after April 1, proceedings in accordance with the first two sentences of Section 54:3-20 were unauthorized; that the failure to give

notice and accord a hearing thereon prior to the making of the assessment made the imposition of the tax null and void; and that the assessments were not saved from nullity by the remedial statutes.

The decision of the Court of Errors and Appeals of New Jersey in the *Duke Power Company* case, affirming the decision of the Supreme Court "for the reasons expressed in the opinion delivered by Mr. Justice Bodine" therein was conclusive evidence of the law of New Jersey on the State questions presented in the complaint herein. The opinion of Mr. Justice Bodine dealt comprehensively with all of the questions here involved concerning the interpretation of Section 54:3-20 and the relation of that section to the other pertinent sections of the Revised Statutes dealing with the New Jersey system of assessment of personal property taxes, as well as with the proper scope of application of the so-called remedial statutes. This holding of the New Jersey courts on these questions cannot, as petitioners contend, be classified as dictum. It was one of two grounds, on both of which the decisions were expressly based. Thus, according to rules clearly established in the decisions of this Court, neither ground is dictum, obiter or judicial, but each is a decision of equal validity with the other.

The decisions of the courts below granting relief to respondent upon the State ground, and thus avoiding decision on the Federal ground, was an exercise of jurisdiction which was in accordance with a long line of decisions of this Court, and consonant with the course contemplated by its latest pertinent decision in *Spector Motor Service Inc.* v. *McLaughlin*, 323 U. S. 101 (1944).

ARGUMENT

POINT I.

THE DISTRICT COURT HAD JURISDICTION TO ENTERTAIN THIS ACTION BECAUSE OF THE SUBSTANTIAL FEDERAL QUESTION RELATING TO DISCRIMINATION AND THE ABSENCE OF AN ADEQUATE REMEDY IN THE COURTS OF NEW JERSEY. THE GRANTING OF RELIEF ON THE STATE GROUND, AFTER THE LAW OF NEW JERSEY THEREON HAD BEEN ESTABLISHED BY THE CASE OF DUKE POWER COMPANY v. STATE BOARD OF TAX APPEALS, WAS A SOUND EXERCISE OF THAT JURISDICTION.

Petitioners base their case, as they did their petition for certiorari, primarily upon their conception of this Court's decision in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943). That case, however, is not in point. Nor did it make new law. The action was dismissed upon well-established equitable grounds (see *Matthews* v. *Rodgers*, 284 U.S. 521, 525-8 (1932), and cases therein cited), because the State of Louisiana furnished an adequate remedy for all tax claims under a procedure whereby the taxpayer was fully protected during the pendency of his action. In the instant case respondent, far from having in New Jersey such an adequate remedy, faced, to say the least, as we shall show in Subdivision (B) of this point, as great an "uncertainty surrounding the adequacy" of the remedy as caused this Court in the later case of *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101 (1944), to order the District Court to retain jurisdiction.

It is the *Spector* case which, both in its decision and the necessary implications of its opinion, governs the question

of jurisdiction herein. In that case a declaratory judgment action was brought in the Federal court to test the validity of the imposition by Connecticut upon the petitioner, a foreign corporation, engaged exclusively in an interstate trucking business, of a tax or excise upon its franchise for the privilege of carrying on business within the State. There as here, both State and Federal grounds were urged for equitable relief, the petitioner claiming both that the taxing statute should not be construed to apply to it and that, if it were so construed, the tax would offend the Constitution of the United States. This Court found (p. 106) that there was "uncertainty surrounding the adequacy of the Connecticut remedy" with respect to the Federal grounds, and also (p. 104) that the courts of Connecticut had not yet spoken authoritatively on the construction of the taxing act. Stressing the importance of avoiding the decision of the difficult questions presented under the Commerce Clause of the United States Constitution except as a last resort, this Court directed that the District Court retain the bill pending the determination of a declaratory judgment action, as to the applicability of the statute to the petitioner, to be brought promptly in the courts of Connecticut. This Court said (pp. 104-105):

> "We would not be called upon to decide any of these questions of constitutionality, with their varying degrees of difficulty, if, as the District Court held, the statute does not at all apply to one, like petitioner, not authorized to do intrastate business. Nor do they emerge until all other local Connecticut issues are decided against the petitioner. * * *
>
> "Answers to all these questions must precede consideration of the Commerce Clause. To none have we an authoritative answer. Nor can we give

one. Only the Supreme Court of Errors of Connecticut can give such an answer. But this tax has not yet been considered or construed by the Connecticut courts. We have no authoritative pronouncements to guide us as to its nature and application. * * *

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law [citing cases]."

As we shall show in Subdivision (D) of this point, the decision of the *Duke Power Company* case by the Court of Errors and Appeals of New Jersey, during the pendency of the instant litigation, supplied the authoritative decision by the State courts on the matters of State law involved which was lacking in the *Spector* case. If at the time of the District Court's decision in the *Spector* case, there had been an equally authoritative decision on the State questions there involved by the highest court of Connecticut, there would have been, as the lower courts held here, no sound reason for subjecting the respondent to the delay and inconvenience of starting another action in the State court to obtain the same relief that could be immediately accorded in the Federal litigation.

It is clear that there is no requirement that the litigation which resolves the State questions be between the same

parties as in the Federal action. The objection to the Federal courts' proceeding to judgment while the State law is unresolved is the "absence of an authoritative and controlling determination by the state tribunals" (*Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168, 172 (1942)), with the result that "a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication" (*Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496, 500 (1941)). In *Findley* v. *Odland*, 127 F. (2d) 948, 953 (C. C. A. 6, 1942), and *In re Central R. Co. of N. J.*, 136 F. (2d) 633, 638 (C. C. A. 3, 1943) both of which cited the *Pullman Company* and *Fieldcrest Dairies* cases, the pertinent pending State litigation, the determination of which the district courts were ordered to await, was between parties other than the Federal litigants.

It follows that, upon the coming down of the decision of the New Jersey Court of Errors and Appeals in the *Duke Power Company* case, there was no reason for the District Court to stay its hand from the adjudication to which respondent was entitled under that decision.

We shall now proceed to develop more particularly the several propositions which lead to the above stated conclusions.

(A) The District Court had jurisdiction of this action by reason of the allegations in the complaint of discrimination against respondent constituting denial to her of the equal protection of the laws, contrary to the Fourteenth Amendment to the United States Constitution.

There can be no doubt that the constitutional question raised was a substantial one, giving the Federal court juris-

diction, in view of the inadequacy of the New Jersey remedy for the discrimination shown in the next subdivision. In *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23 (1931), this Court summarized the result of an unquestioned line of decisions as follows (pp. 28-29):

> "It is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property. *Sunday Lake Iron Co.* v. *Wakefield* [247 U. S. 350], *supra; Sioux City Bridge Co.* v. *Dakota County* [260 U. S. 441], *supra; Raymond* v. *Chicago Union Traction Co.*, [207 U. S. 20], *supra; Chicago Great Western Ry. Co.* v. *Kendall*, [266 U. S. 94], *supra.*"*

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*Cases involving legislative distinctions between different classes of property or persons for purposes of taxation must be distinguished from this rule and are not applicable here. The following extract from this Court's opinion in *Nashville, Chattanooga & St. Louis Railway* v. *Browning*, 310 U. S. 362, 367-8 (1940) makes plain this distinction:

> "It must be emphasized that the Company makes no claim that its property is singled out from among other public service corporations for discrimination. Its asserted grievance is common to the whole class. We must put to one side therefore all those cases relied on by the petitioner which invoked the Fourteenth Amendment against discriminations invidious to a particular taxpayer. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350; *Sioux City Bridge* v. *Dakota County*, 260 U. S. 441; *Bohler* v. *Callaway*, 267 U. S. 479; *Cumberland Coal Co.* v. *Board*, 284 U. S. 23; *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239. All these cases are inapposite. None denied power to a state to apply different yardsticks to different classes of property."

It makes no difference that the allegations of discrimination in the complaint were denied in the answer. It is well settled that jurisdiction is to be "determined by the allegations of the bill" (*Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U.S. 56, 60 (1939)) "if there be enough of substance in them to require the Court to hear and determine the cause" (*Flanders* v. *Coleman*, 250 U.S. 223, 227 (1919)).

There can be no question here of the substantiality of the allegations. It was alleged (Complaint, Par. 41, R. 32-33) that the assessing authorities in the taxing districts, not only of Hillsborough but of Somerset County and of other counties in New Jersey, and the County and State authorities charged with the duty of revising, correcting and equalizing assessments, have "consistently, systematically, intentionally and notoriously failed to assess at true value, or at all, the intangible personal property owned by taxpayers generally" even though required to do so by the Constitution and statutes of the State; that the authorities involved "deliberately singled out the plaintiff, individually and as such Trustee, with the intent and for the purpose of imposing * * * a crushing and discriminatory burden of taxation grossly disproportionate to the taxes imposed upon other taxpayers." It was further alleged (Par. 42, R. 33-34) that this discrimination "was at the instigation of one Alfred L. Kirby, a tax ferret and informer, widely known as such in the State of New Jersey, for the personal gain of said Kirby"; that Kirby had an arrangement with the Township of Hillsborough whereby he undertook to indemnify and save harmless the Township against all costs and expense, including counsel fees, and whereby Kirby was to receive as his compensation a substantial percentage

of all taxes which might be collected under the purported assessments; and that Kirby persuaded the taxing authorities so to single out respondent because such action was without risk of loss or expense to the Township and "was at a time and in a manner which would not reduce the tax rate for said years or increase the ratables subject to said tax rate in peril of subsequent reduction of the ratables and tax collections in the event of successful resistance to said assessments". As was said in *Green* v. *Passaic County Board of Taxation*, 131 N.J.L. 13, 17, 34 A. (2d) 245, 247 (Sup. Ct. 1943):

> "It seems, therefore, that the borough stands to be the sole beneficiary without sharing with the county or the state in whatever tax increment may flow from this proceeding [brought under Sec. 54:3-20 to add property 'omitted in the assessment'] * * *."

Such a situation was described by Mr. Justice Bodine in the *Duke Power Company* case (129 N.J.L., p. 455, 30 A. (2d), p. 420) as "a municipal windfall." Here the result would have been to render unnecessary for something over a century the levying of any taxes in the Township to meet its annual budget of about $96,000.

(B) The jurisdiction is not affected either by the Johnson Act or the equitable rule followed in Great Lakes Dredge & Dock Co. v. Huffman because there is no adequate remedy in the administrative agencies or the courts of New Jersey for relief from unconstitutional discrimination.

The Johnson Act (Sec. 24(1) of the Judicial Code, 28 USC 41(1), as amended August 21, 1937, provides as follows:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of said State."

The question whether this statute applies to a declaratory judgment action the prayer in which is for an adjudication that state tax assessments are void, but does not include a prayer for injunctive relief, was expressly left open in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943), and this Court has not since had occasion to consider it. And the question is not present here. What this Court said in the *Huffman* case was (p. 299):

> "But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure."

This Court went on to say (p. 300):

> "Called upon to adjudicate what is essentially an equitable cause of action, the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds."

Where, as here, an adequate remedy by State process from an exaction which offends the Fourteenth Amendment is absent, or where uncertainty surrounds the adequacy of

such remedy, the Federal jurisdiction is plain, regardless of whether the action is of a kind to which the Johnson Act would otherwise apply. That was explicitly held in *Spector Motor Co. v. McLaughlin*, 323 U. S. 101 (1944), where this Court said (pp. 105-6):

> "The District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate despite the Johnson Act and *Great Lakes Dredge Co. v. Huffman*, 319 U. S. 293, because of the uncertainty surrounding the adequacy of the Connecticut remedy. See *Waterbury Savings Bank v. Lazder*, 46 Conn. 243; *Wilcox v. Town of Madison*, 106 Conn. 223, 137 A. 742."

Since the Connecticut law did make possible a determination of the State questions involved in that case, through an action for declaratory judgment, this Court remanded the cause to the District Court to retain the bill pending the determination of such an action in the State court. The Federal jurisdiction was not denied; it was retained.

In this case the situation is *a fortiori*. We submit that there was complete absence of adequate remedy for unconstitutional discrimination in taxation through the administrative and judicial agencies of New Jersey.

Art. IV, Sec. 7, Par. 12, of the Constitution of the State of New Jersey provides:

> "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

The General Tax Act of the State of New Jersey (R.S. 54:4-1) provides:

> "All property, real and personal, within the jurisdiction of this state not expressly exempted from

> taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts * * *"

The administrative bodies and courts of New Jersey have interpreted this constitutional and statutory requirement of assessment at "true value" as precluding the only relief for the taxpayer discriminated against that this Court regards as adequate, namely, "to have his assessment reduced to the percentage" of the true value at which others were assessed (*Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 446 (1923)).

In a long line of decisions, dating back as far as 1856, the courts of New Jersey have held that a taxpayer who has been singled out for discriminatory taxation is restricted to plenary statutory proceedings against the other members of his class for the purpose of having the same burden of taxation placed upon their shoulders as that placed upon his; that he may not on his own appeal obtain equalization by a reduction of his own assessment. The latest cases also hold that in the trial of his own tax appeal the taxpayer may not even introduce evidence of the discrimination, but is limited to producing evidence that the assessment upon his own property is in excess of true value.

The leading New Jersey case is *Royal Mfg. Co.* v. *Board of Equalization of Taxes*, 76 N.J.L. 402, 70 Atl. 978 (Sup. Ct. 1908), affirmed 78 N.J.L. 337, 74 Atl. 525 (Ct. Err. & App. 1909). In the New Jersey Supreme Court the opinion by Mr. Justice Parker said (76 N.J.L., pp. 404-5, 70 Atl. pp. 978-9):

> "A number of reasons are advanced, but they all are fairly comprised within these two, excepting one

point with regard to the alleged rejection of evidence by the state board, which will now be disposed of with the first reason. So far as this claim is concerned, viz., that there are other properties in Rahway worth more than this one and valued at less, this would be a good ground for pressing for an increase of valuation for the other properties, but not for reducing the valuation of the property in question. Any taxpayer, who considers that other property in the same tax district is undervalued, is entitled to go to the county board and apply to have the valuation of such other property raised. P.L. 1906, p. 212, §3*; *Laflin & Rand Powder Company* v. *Township of Wayne* (N.J. Sup.) 68 Atl. 909. Since the passage of the act creating a county board of taxation (P.L. 1906, p. 210), there has been no legal warrant, if there ever was any, for scaling down valuations of taxable property in this state by adopting a uniform percentage of actual value, although such was the general practice for years. By that act the county boards are required to secure taxation of all property at its true value; so that the fact that the property of A. is assessed at its true value, and the property of other taxpayers within the same district is assessed below its true value, affords A. no ground for demanding a reduction of his valuation, though it does entitle him to apply for an increase in the valuation of the others. It therefore follows, not only that the first reason was without any legal merit, but that the offer to prove before the state board on the appeal from the valuation of the prosecutor's property that other property was valued proportionately lower was properly rejected by that board."

*Section 3 of the County Board Act of 1906 became Section 701 of the Tax Revision of 1918 (P.L. 1918, ch. 236, p. 879) which in turn became R.S.N.J. 54:3-21, 22.

On the affirmance Chief Justice Gummere for the Court of Errors and Appeals said (78 N.J.L., p. 338, 74 Atl., p. 526) that the decision below was right because

> "the Constitution requires that property shall be assessed for taxation according to its true value, and a reduction below true value would be a violation of that constitutional provision. * * *"

That decision had been anticipated by five decisions, one of which, like the *Royal Mfg. Co.* case, received the unanimous affirmance of the Court of Errors and Appeals: *State* v. *Randolph*, 25 N.J.L. 427, 431 (Sup. Ct. 1856); *State, Paulison, Pros.* v. *Taylor*, 35 N.J.L. 184, 189 (Sup. Ct. 1871); *State, Wharton, Pros.* v. *Koster*, 38 N.J.L. 308 (Sup. Ct. 1876); *State, Maxson, Pros.* v. *Segoine*, 53 N.J.L. 339-40, 21 Atl. 852 (Sup. Ct. 1891), affirmed 54 N.J.L. 212, 25 Atl. 963 (Ct. Err. & App. 1891); *Central R. Co. of N. J.* v. *State Board of Assessors*, 74 N.J.L. 1, 65 Atl. 244 (Sup. Ct. 1906).

Royal Mfg. Co. v. *Board of Equalization of Taxes* was followed in *Pennsylvania Coal Co.* v. *Saddle River*, 96 N.J.L. 40, 43, 114 Atl. 157, 158 (Sup. Ct. 1921), in which the opinion of the Supreme Court dismissed the argument based on discrimination, as follows:

> "Thirteenth, that the Fourteenth Amendment was infringed by the county board 'singling out' the coal in question for a raise in valuation to its full value without doing the same to other property. This is a different matter and may be dismissed in a word. We find no evidence, and prosecutor cites none, indicating that the county board discriminated in any such manner, but if it appraised the coal at its full market value, that is what the law called for.

> and if this was not done in other cases prosecutor had its remedy under the tax act. P. L. 1918, p. 879, §701."

The remedy referred to was the right to institute proceedings against all other taxpayers of the class for the purpose of increasing their assessments. (Section 701 of the Tax Revision of 1918, now R.S.N.J. 54:3-21 and 22).

That so-called remedy this Court in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441 (1923) held to be no remedy at all. The charge made by the Bridge Company in that case was that the State intentionally and arbitrarily assessed its property at 100% of its true value and all other real estate and its improvements in the county at 55%. The applicable Nebraska statute, as authorized by its Constitution, required the assessment to be based on actual value. The Nebraska court held that the Bridge Company had no remedy except "to have the property assessed below its true value raised rather than to have property assessed at its true value reduced", which was precisely the rule adopted by New Jersey. This Court said (p. 446):

> "The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district. This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute."

The same rule was enunciated by this Court in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 247 (1931), as follows:

> "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. *Cumberland Coal Co.* v. *Board of Revision, supra; Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 514-518; *Chicago Great Western Ry. Co.* v. *Kendall*, 266 U. S. 94, 98; *Sioux City Bridge Co.* v. *Dakota County, supra.*"

Petitioners' brief (p. 22) says that the leading New Jersey decision, the *Royal Manufacturing Company* case, was decided in 1909 whereas the *Sioux City Bridge* case was not decided by this Court until 1923, and that in the former case no reference was made to any case in this Court holding that the taxpayer's constitutional right has been violated when administrative bodies and State courts fail to provide an adequate remedy for intentional and systematic discrimination. The point of chronology is without merit.

The *Sioux City Bridge* case by no means originated the Federal rule. It goes back at least to the year 1879, when this Court decided *Cummings* v. *National Bank*, 101 U. S. 153. The rule that the only adequate remedy to the taxpayer discriminated against was to reduce his own assessment was enunciated in 1898 in a decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Taylor*

v. *Louisville & Nashville R. R. Co.*, 88 Fed. 350, 364, 365 (opinion by Circuit Judge Taft) and the specific language of that opinion was approved and incorporated in the opinion of this Court in *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 516-517, 518 (1917).

As above appears, the Federal question under the Fourteenth Amendment was raised unsuccessfully in New Jersey in the *Saddle River* case in 1921. And in *Hackensack Water Co.* v. *Woodcliffe Lake*, 104 N. J. L. 48, 49, 139 Atl. 410, 411 (Sup. Ct. 1927), the court expressly refused to follow the decision of this Court in the *Sioux City Bridge Co.* case, saying:

> "The prosecutor urges that the case of *Sioux City Bridge Co.* v. *Dakota County*, Neb., 260 U. S. 441, is authority for the position which it takes—namely, that it is entitled to show discrimination and to obtain a lowering of its assessment to the percentage that other assessments in Woodcliffe Lake borough bear to the market value of the property assessed.
>
> "In the *Sioux City* Case the Supreme Court of the United States held that the bridge company was entitled to equality of taxation, and that if other property was assessed at only 55 per cent. of its true market value, that the assessment upon the property of the bridge company would be decreased to the same percentage of market or true value at which other property was assessed.
>
> "The difficulty with the contention of the prosecutor in the present case is twofold. In the first place, the Constitution of this state requires that property shall be assessed for taxation according to its true value. In the case of *Royal Manufacturing Co.* v. *Board of Equalization of Taxes*, 78 N. J. L. 337, 74 A. 525, the Court of Errors and Appeals decided that the fact that other property in a taxing

district is assessed for taxation at less than its true value affords no ground for reducing the assessment upon the ground of a complaining taxpayer below the true value thereof."

Petitioners contend that all cases in this unbroken line of New Jersey authorities were in effect overruled by the case of *Central R. Co.* v. *Martin, State Tax Commissioner*, 112 N.J.L. 5, 169 Atl. 489 (Ct. of Err. & App. 1933) which, they say, recognized the rule of the *Sioux City Bridge Company* case and other similar decisions of this Court as applicable in New Jersey. The Court below did not so interpret that opinion, and we submit that its conclusion thereon was correct.

The *Martin* case did not arise under the General Tax Act, (Subtitle 2 of Title 54 of the New Jersey Revised Statutes, Appendix p. iii) here applicable, but under the Railroad Tax Act (Part 4 of Subtitle 4, Appendix p. vi). Necessarily, therefore, the applicability of the sections of the General Tax Act, whereunder the New Jersey courts have confined general taxpayers "singled out" for discriminatory taxation to the inadequate relief specified in R. S. N. J. 54:3-21 and 22, was not before the courts in the *Martin* case. In that case a railroad challenged the tax rate applied to railroads. It alleged no facts to support a case of discrimination within the railroad class. It did not seek either to obtain a reduction in the assessed valuations placed upon its own properties to the level of the valuations placed upon the properties of taxpayers assessed under the General Tax Act, or to obtain an increase in the valuations placed upon the properties of such general taxpayers. Its objective was to obtain a recomputation of the rate at which it had been taxed on its main-stem and tangible personal property and

franchise, which was the rate applied to railroads generally.* That rate, known as the "average rate of taxation" (R. S. N. J. 54:24-3), was ascertained by dividing the aggregate of the ratables assessed under the General Tax Act into the aggregate amount of taxes to be raised thereunder (*ibid.*). The railroad's contention was that its tax rate was excessive because the valuations placed upon properties assessed under the General Tax Act were below the true values and that the resulting divisor of the average tax rate formula was therefore too low. The Court of Errors and Appeals held that the railroad had failed to sustain its contention by sufficient competent proof. When the case reached the courts, the Railroad also attempted (112 N. J. L., pp. 6-8, 169 Atl., pp. 489-490) to raise questions of unlawful discrimination in violation of the Fourteenth Amendment, and to relate the proof that it had offered in the Board of Taxes and Assessments and by depositions in the Supreme Court to the rule of the *Sioux City Bridge Company* case and similar decisions of this Court. Mr. Justice Perskie, writing for the Court of Errors and Appeals, reviewed this evidence and held, for a unanimous Court, that it did not meet the test of a systematic and intentional undervaluation of property other than railroad property. In so doing the Court simply decided that the point raised by the railroad was not supported by the facts. It was therefore unnecessary for the Court to consider the question whether,

*The statement in petitioners' brief at page 18 that the Railroad "sought to have its tax reduced to a 60% basis" is erroneous, as the portion of the *Martin* opinion quoted at pages 21-22 of petitioners' brief, demonstrates. That quotation clearly shows that the railroad's "basic or fundamental grievance" was the tax rate of $4.081 per $100 of assessed value of property devoted to railroad purposes, which rate it sought to have reduced to $2.093 per $100 of value.

if such a pattern of systematic discrimination had been proved, New Jersey would have accorded any relief therefor.

None of the cases which we have above cited as establishing the New Jersey law that there is no such remedy was so much as cited in the opinion in the *Martin* case. Clearly, we submit, the Court of Errors and Appeals could not have intended to overrule such an unbroken line of authority without any discussion thereof.

That the *Martin* case is not regarded by the courts of New Jersey as having any bearing upon the issue of remedy for unlawful discrimination is clearly shown by a decision, less than a year later, by Mr. Justice Perskie, the very same judge who wrote the opinion for the Court of Errors and Appeals in the *Martin* case. (*Lehigh Valley R. R.* v *State Board*, 12 N.J. Misc. 673, 174 Atl. 359 (Sup. Ct. 1934).) That case arose under the General Tax Act, as did the *Royal Mfg. Co.* case and as does this case; so the precise point involved in the instant case was at issue there. Mr. Justice Perskie for the Court said (12 N.J. Misc., p. 675, 174 Atl., p. 360):

> "Did the state board commit an error in law in refusing to hear the testimony of petitioners touching discrimination? Decidedly no. It is the established law of this state that the fact that other property in a taxing district is assessed for valuation at less than its true value affords no ground for reducing the assessment placed upon the property of a complaining taxpayer below the true value thereof. *Royal Manufacturing Co.* v. *Board of Equalization of Taxes*, 78 N.J.L. 337, 74 Atl. Rep. 525. The petitioners concede this to be true, but contend that the rule to the contrary, as announced in the cases of which *Sioux City Bridge Co.* v.

> *Dakota County*, 260 U.S. 441, is typical, should be followed, and that the holding of *Royal Manufacturing Co. v. Board of Equalization of Taxes, supra*, should be disapproved. A substantially like contention was made and denied by this court in the case of *Hackensack Water Co. v. State Board of Taxes and Assessment*, 104 N.J.L. 48, 139 A. 410. The law, on this point, is also settled and controlling."

In that case Mr. Justice Perskie did not even mention the *Martin* case, the opinion in which he had himself written less than a year before. Instead, he referred to the *Royal Manufacturing Co.* case as "the established law of this State" and to it and the *Hackensack Water Company* case as being "controlling" in spite of the decision of this Court in the *Sioux City Bridge Co.* case.

It is clear, therefore, that the *Martin* case has no bearing on the law of New Jersey on this subject. Petitioners say (Br. p. 23) that the *Martin* case could not be overruled by the subordinate New Jersey Supreme Court. That is true, but irrelevant. The question is rather whether the *Martin* case should be interpreted as overruling the prior decisions of the Courts of New Jersey including those of the Court of Errors and Appeals. It did not purport to do so, even by way of dictum, and no such holding can be inferred.

We submit, therefore, that there was a complete absence of remedy in the administrative agencies and courts of New Jersey for discriminatory taxation violative of the Fourteenth Amendent. Under the New Jersey authorities above cited, neither the administrative agencies nor the courts would even have permitted respondent to introduce

evidence to support her contention that the administration of the New Jersey system of taxation of personal property had been intentionally and systematically to omit all assessment of intangible property of the sort which was the subject of the disputed assessments here.*

But, at the very least, it is plain that any remedy offered by New Jersey was not "plain, adequate and complete" within the language of this Court's decisions stating the rule in equity or "plain, speedy and efficient" within the

*Petitioners' brief (p. 16) says that in the *Duke Power Company* case the claim of discrimination had been one of the grounds of appeal to the State Tax Board and in that connection cites an extract from the opinion of the Board in *Duke Power Company* v. *Hillsborough Township*, 20 N.J. Misc. 240, 26 A. (2d) 713. The implication is that, if the Duke Power Company had attempted to prove the charge of discrimination, a hearing would have been accorded thereon. The record does not support that implication. The fact, as appears from the record in that case, is that before the trial in the State Board, the Duke Power Company filed as a part of the record a paper setting forth the New Jersey cases on the discrimination question and concluding:

> "These decisions are of course binding upon this Board. By reason of them it is impossible for the Duke Power Co. to secure the relief against this discrimination which the Supreme Court [of the United States] has held to be the proper and only adequate remedy. In the quotation made from Mr. Justice Perskie's opinion he said the State Board had not committed an error of law in refusing to hear the testimony of petitioners touching discrimination. On this account the Duke Power Co. withdraws the points of its petition of appeal with respect to discrimination and will offer no evidence in support of them or the claimed discrimination."

The discrimination point was therefore entirely out of the *Duke Power Company* case both at the trial before the administrative agency, the State Tax Board, and in the judicial proceedings before the Supreme Court of New Jersey and the Court of Errors and Appeals.

language of the Johnson Act. Instead, the adequacy of the New Jersey remedy would still be surrounded by uncertainty, within this Court's holding in the *Spector* case, even if it were assumed that the decision of the Court of Errors and Appeals in the *Martini* case were sufficient to raise some doubt as to whether the preceding line of decisions and the later *Lehigh Valley* case would, in a case that raised the question, be followed by it. The State remedy which would cause a Federal court having jurisdiction on traditional grounds to stay its hand from the exercise thereof must be one free from doubt, which does not "leave the plaintiff's to a speculation upon what the State Court might say if an action at law were brought". (Holmes, J., in *Wallace* v. *Hines*, 253 U.S. 66, 68 (1920).) (*Union P. R. Co.* v. *Weld County*, 247 U.S. 282, 285-6 (1918); *Dawson* v. *Kentucky Distilleries Co.*, 255 U.S. 288, 296 (1921); *Atlantic Coast Line R. Co.* v. *Daughton*, 262 U.S. 413, 426 (1923); *American Life Insurance Co.* v. *Stewart*, 300 U.S. 203, 212, 214-215 (1937).)

The situation being such with respect to the remedy for denial of the Federal constitutional right, which gave the courts below jurisdiction, it would not matter if there were a remedy under the branch of the case which concerns the construction of Section 54:3-20 of the New Jersey Revised Statutes. In *Greene* v. *Louisville & Interurban R. Co.*, 244 U.S. 499 (1917), which was a Federal suit in equity to enjoin local taxes on grounds under the State law and also because they were discriminatory in violation of the Fourteenth Amendment, without adequate remedy therefor under the State law, this Court said (p. 520):

> "A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the

> entire case made by the bill in equity. Were we to require a dismissal of these bills as to the state taxes, retaining them as to the local taxes, we should multiply suits, instead of preventing a multiplicity of suits. It is a familiar maxim that 'a court of equity ought to do justice completely, and not by halves;' and to this end, having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law. [citing cases]".

See also *Risty* v. *Chicago, Rock Island and Pacific Ry. Co.*, 270 U.S. 378, 388 (1926).

At the time of the filing of the complaint in this action, however, not even the New Jersey remedy under the State ground was certain, as we show in the following subdivision.

(C) At the time the complaint herein was filed it was not clear under New Jersey law that an omitted property assessment made after April 1, without prior notice or hearing, was null and void under Revised Statutes, Section 54:3-20.

The correctness of the decision of the courts below herein on the invalidity of the assessment under New Jersey Revised Statutes, Section 54:3-20 will be argued in Point II. Our purpose in this subdivision is merely to summarize the legal situation as of the date of the filing of the complaint in the instant case.

The assessment procedure adopted by petitioners in this case was admittedly predicated upon the first two sentences of Section 54:3-20 relating to omissions "by the assessor." At the time of the filing of the complaint herein the question whether that part of the statute applied to pro-

ceedings after April 1 to assess property omitted "in the assessment", without compliance with the requirements of prior notice and hearing prescribed by the third sentence, was being litigated in the administrative agencies of New Jersey by the Duke Power Company. Some ten and one-half months after the complaint herein was filed the State Board of Tax Appeals held that an assessment of omitted property after April 1 by resolution of a County Board of Taxation under the first two sentences of the section was valid; that subsequent notice of the time and place of the next meeting of the County Board was sufficient; and that, if there were any defects in such procedure, they might be disregarded under the so-called remedial statutes (R.S.N.J. 54:4-58 and 59).

Until that decision of the Board of Tax Appeals was reversed by the Supreme Court and the Court of Errors and Appeals of New Jersey, no New Jersey case had expressly held that for an assessment of omitted property made after April 1 the procedure prescribed in the third sentence of Section 54:3-20 was exclusive; and it was not clear under the decisions whether the remedial statutes were applicable to the facts of this case. In fact, the *Duke Power Company* case and this one were the first cases in New Jersey to raise the question whether the two forms of procedure prescribed respectively by the first part and the second part of Section 54:3-20 were alternatively available to the taxing authorities where assessments were attempted after April 1, when the work of assessment had been completed and the tax rate had been definitely fixed. There had therefore been no prior occasion for the courts of New Jersey to consider either this aspect of the proper interpretation of Section 54:3-20 or the question of the applicability of the remedial statutes thereto.

At the time this declaratory judgment action was started, therefore, the result of a suit, if brought in the courts of New Jersey upon the State ground therein alleged, would have been unpredictable. It follows that if, at the time of the complaint herein, or at any time during the pendency of this case prior to the decision of the Court of Errors and Appeals in the *Duke Power Company* case, an application for a summary judgment on the ground of the nullity of the assessment under the third sentence of Section 54:3-20 had been made, the Federal court would have been called upon to exercise a nice discretion whether or not to decide it before the State courts had spoken with clarity on the question.

The situation at that point was that the District court had jurisdiction, due to the absence or uncertainty of the State remedy with respect to the Federal question of discrimination, but had as yet no sufficient light in the New Jersey authorities to enable it with any assurance to decide the case on the State questions.

(D) Upon the decision of the New Jersey Court of Errors and Appeals in the Duke Power Company case, it became appropriate for the District Court to exercise its jurisdiction by deciding in respondent's favor on grounds of State law and thus avoid the necessity of deciding the questions raised under the United States Constitution.

The decision of the *Duke Power Company* case on March 9, 1944 by the New Jersey Court of Errors and Appeals, "for the reasons expressed in the opinion delivered by Mr. Justice Bodine in the Supreme Court", removed the last impediment to the decision of the instant case on the ground of the nullity under Section 54:3-20 of the disputed assessments against respondent. Except for the prior uncertainty of the New Jersey law on that subject, the right

of the courts below to decide the case on that ground had always been clear.

It has long been the established law that, where a Federal court has jurisdiction, it has both the right and the duty of disposing of the case on State rather than Federal grounds. A leading case is *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 191, 193 (1909), a Federal suit in equity to enjoin State rates on the grounds that they were unauthorized by the State and violated the Federal Constitution, with no adequate State remedy therefor. This Court held that the allegations of the bill gave the Federal court equity jurisdiction and thereby

> "* * * the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.
>
> "This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit [citing cases.]
>
> * * * * * * *
>
> "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons."

The decision was approved on extended consideration as stating the fundamental law on this subject in *Hurn* v. *Oursler*, 289 U. S. 238, 243-8 (1933). In *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499 (1917), this Court said (p. 508):

> "* * * This being so, the jurisdiction of that [the lower Federal] court extended, and ours on appeal

> extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all." [citing the *Siler* Case, *supra*, and *Ohio Tax* Cases, 232 U. S. 576, 586 (1914).]

And this doctrine was followed in two other tax cases in *Risty* v. *Chicago Rock Island & Pacific Ry. Co.*, 270 U. S. 378 (1926); and *Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116 (1927). In the *Risty* Case, at p. 387, this Court said:

> "As our decision in these cases turns on the construction and application of the state law, we do not pass upon the Constitutional questions raised. See *Bohler* v. *Callaway*, 267 U. S. 479, 489; *Chicago G. W. R. Co.* v. *Kendall*, 266 U. S. 94, 97-98. They are, however, questions of substance and sufficient to give the court jurisdiction to pass on the whole case. *Greene* v. *Louisville & Interurban R. R. Co.*, *supra*; *Chicago G. W. R. Co.* v. *Kendall*, *supra*; *Bohler* v. *Callaway*, *supra*."

We discuss the *Duke Power Company* case in detail in Point II. It is sufficient for purposes of the present discussion to say that it held comprehensively, on an indistinguishable state of facts, that proceedings in accordance with the first two sentences of Section 54:3-20 were unauthorized; that the failure to give notice and accord a hearing thereon prior to the making of the assessment made the attempted imposition of the tax null and void; and that nullities could not be made valid assessments by the remedial statutes.

The only remaining question is whether the courts below should, instead of themselves rendering judgment for petitioners, have remitted respondent to the New Jersey state

courts to have the law, as laid down in the *Duke Power Company* case, applied in a new action in the State courts instead of being applied at once in the Federal court action. Certainly the traditional rules which usually govern the exercise of Federal jurisdiction are against imposing upon litigants the delays and inconvenience which would inevitably result from such a course. In *Meredith* v. *Winter Haven*, 320 U. S. 228 (1943), the Court said (p. 237):

> "We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."*

To the same effect see *Cooper* v. *American Air Lines, Inc.*, 149 F. (2d) 355 (C. C. A. 2, 1945); *In re President and Fellows of Harvard College*, 149 F. (2d) 69 (C. C. A. 1, 1945).

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*It is even doubtful whether at this time, over four years after the proceedings in the instant case were started, and after the adoption by the Somerset County Board of Taxation of the resolutions here in controversy, there is left any remedy available to respondent to cancel the assessments under question. In New Jersey, lack of jurisdiction of the County Board or irregularity in its proceedings is tested in the New Jersey Supreme Court on certiorari to that court. *Schwartz* v. *Essex County Board of Taxation*, 130 N. J. L. 177, 32 A. (2d) 354 (Ct. Err. & App. 1943), affirming 129 N. J. L. 129, 28 A. (2d) 482 (Sup. Ct.

This Court in the *Winter Haven* case recognized that only in exceptional circumstances will Federal courts refuse to exercise their jurisdiction to decide questions of State law. One of these exceptions, that "a Federal Court having jurisdiction of the cause may decline to interfere * * * with the collection of State taxes or with the fiscal affairs of the State" (320 U. S., p. 235) is a restatement of the equitable rule of cases such as *Matthews* v. *Rodgers*, *supra*, and the *Huffman* case, *supra*, which rule has heretofore been discussed and found to be inapplicable to the instant case (*supra*, pp. 17, 24-5).

The *Central Railroad of New Jersey* and *Odland* cases previously cited in this brief (*supra*, p. 20) clearly indicate that the rule of the *Siler* case, (*supra*, p. 41) is to be applied as soon as the State law has been established in cases pending between litigants other than the Federal litigants. By the time the motion for summary judgment was made in the instant case, authoritative evidence of State law, which the district courts were ordered to await in the *Spector*

1942). The appeal provided to the State Division of Tax Appeals was by rule of that body barred ninety days after the adoption of the resolutions on June 26, 1941. The New Jersey Supreme Court has the inherent right to review by certiorari but its exercise thereof is purely discretionary and the allowance of the writ is not a matter of right. *Staubach* v. *Cities Service Oil Co.*, 130 N. J. L. 157, 31 A. (2d) 804 (Ct. Err. & App. 1943), dismissing appeal from 127 N. J. L. 577, 24 A. (2d) 193 (Sup. Ct. 1942). And the Supreme Court's refusal to allow a writ may not be judicially reviewed by the Court of Errors and Appeals. *Staubach* v. *Cities Service Oil Co.*, *supra*; *Post* v. *Anderson*, 111 N. J. L. 303, 168 Atl. 622 (Ct. Err. & App. 1933), affirming 11 N. J. Misc. 1 (Sup. Ct. 1932). Review on certiorari was denied on facts somewhat analogous to those here in *Red Oaks, Inc.* v. *Dorez, Inc.*, 117 N. J. L. 280, 187 Atl. 737 (Sup. Ct. 1936).

Fieldcrest, Pullman, Central Railroad Company and *Odland* cases had been provided by the New Jersey courts in the *Duke Power Company* case. The judgment of the District Court on the State ground was therefore timely and manifestly correct.

POINT II

THE COURTS BELOW CORRECTLY CONSTRUED AND APPLIED THE LAW OF NEW JERSEY AS ENUNCIATED BY ITS HIGHEST COURTS IN THE DUKE POWER COMPANY CASE.

The *Duke Power Company* case, as above stated, squarely held that an assessment based on a procedure identical with the procedure used in the instant case is absolutely null and void under the laws of New Jersey.

The facts of that case are stated at pages 10 and 11 of this brief. The Company took an appeal from the action of the Somerset County Board of Taxation to the State Board of Tax Appeals. It made two contentions, first that the assessment was void under R.S.N.J. 54:3-20, and, second, that the property covered thereby was exempt from taxation in New Jersey pursuant to R.S.N.J. 54:4-3.2 as having been already taxed in North Carolina.

The opinion of the New Jersey State Board of Tax Appeals, on June 2, 1942, reported at 20 N. J. Misc. 240 and 26 A. (2d) 713, discusses these contentions in the order above stated and at great length. As to the first contention, which is here alone material, the Board held (20 N. J. Misc., pp. 246-257, 26 A. (2d), pp. 719-724) that the two parts of Section 54:3-20 gave the County Board of

Taxation alternative methods of assessing omitted property, regardless of whether the assessment was before or after April 1, and that where it "*chooses to act* with respect to omitted property, *on its own motion*, or on information known to one of its members or otherwise received, it may add the property by resolution forthwith, giving notice of the time and place of its next meeting to the taxpayer affected" (italics the Board's). (20 N. J. Misc., p. 248, 26 A. (2d), p. 719). It then discussed the so-called remedial statutes as follows (20 N. J. Misc., p. 250, 26 A. (2d), p. 720):

> "Another view of these matters requires the same result. Respondent contends that the objections assigned by the petitioner to the proceedings of November 22, and of December 2, 1940, are, at most, irregularities or illegalities amendable under R.S. 54:4-58, N.J.S.A.* 54:4-58, and that on this review it is the duty of this board, under R.S. 54:4-59, N.J.S.A. 54:4-59, to make such amendment and to determine the sum for which petitioner was lawfully taxable by the respondent taxing district, for the tax year 1939. We are in accord with this view."

In the comprehensive consideration of the question which follows (20 N. J. Misc., pp. 250-258, 26 A. (2d), pp. 721-724) the Board of Tax Appeals cited and discussed every case relied on by petitioners herein in the part of their brief (pp. 33-41) dealing with these remedial statutes, and

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*"N.J.S.A.", cited in the opinions in the Duke Power Company litigation, refers to "New Jersey Statutes Annotated," the numbering of which corresponds to that of the Revised Statutes of New Jersey.

they cite no case that was not relied upon by the Board of Tax Appeals; indeed, the treatment of this subject in petitioners' brief is strikingly similar to the discussion in the Board's opinion. Applying the remedial statutes, and particularly the provision of Section 54:4-59 that the court reviewing the tax "shall amend all irregularities, errors or defects, and may if necessary ascertain and determine the sum for which the person or property was legally liable and by order or decree fix the amount thereof", the Board of Tax Appeals conducted a trial *de novo* on the questions of valuation and exemption and reached the conclusion that the total assessable amount of property, which it held was not exempt, was $11,004,815.44 (20 N. J. Misc., pp. 258-269, 26 A. (2d), pp. 724-729).

On review by the New Jersey Supreme Court on writ of certiorari (129 N.J.L. 449, 30 A. (2d) 416), the Supreme Court reversed the State Board of Tax Appeals on both branches of the case. The major discussion was on the point of the nullity of the assessment proceedings and the inapplicability of the remedial statutes, on which point the Hillsborough Township had in its briefs pressed upon the Supreme Court, as it did later upon the Court of Errors and Appeals, all of the arguments and cases relied on in petitioners' brief in this Court. The point that the property was exempt was treated as a question of fact and determined summarily. The Court of Errors and Appeals, as above pointed out, affirmed "for the reasons expressed in the opinion delivered by Mr. Justice Bodine in the Supreme Court" (131 N.J.L. 275, 36 A. (2d) 201).

Because of the resulting importance of the reasoning of Mr. Justice Bodine, we quote somewhat extensively from

his opinion in the Supreme Court on the question of the invalidity of the assessment procedure, as follows (129 N.J.L., pp. 452-455, 30 A. (2d), pp. 418-420):

> "N.J.S.A. 54:3-20 provides a method for the inclusion of property omitted by the assessor and another method for the inclusion of property omitted from the assessment. Let us glance first at the procedure when property is omitted from the assessment. 'On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on *five days'* notice in writing to the owner by the party complaining, and after *due examination and hearing*, may enter the omitted property on the duplicate by *judgment rendered within ten days* after the hearing. * * * *Such proceedings may be brought within one year from the date when taxes on real property become a lien.*' The italics supplied.*
>
> "There was no compliance whatever with the provisions of the law as we have seen. The notice was, in part, defective and there was no notice of the hearing when the question of the value of intangibles was determined, and no proceeding in a judicial manner as required by law. * * *
>
> "The defendants contend that their proceedings were proper because it was under the first part of N.J.S.A. 54:3-20, which reads as follows: 'The county board of taxation shall, by resolution, cause to be entered upon the tax duplicate a proper assessment against any property *omitted* by the assessor. The board shall then give immediate notice of such entry and of the time and place of its next meeting

*That is, supplied by Mr. Justice Bodine.

to the owner of the property affected, and furnish a copy of the entry to the clerk or collector of the taxing district, who shall enter it on his tax list." [Italics the Court's.]

"There is a vast difference between the inclusion of property omitted by the assessor and property omitted from the assessment.

"N.J.S.A. 54:4-55 provides: 'The county board of taxation shall, on or before April first in each year, cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes assessed, to be delivered to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record.' This limits action with respect to property omitted by the assessor to April 1, 1939.

* * * * * *

"The assessment was made on the complaint of an aggrieved taxpayer, and the procedural direction of the statute required a specific notice to the owner of the precise property claimed to be omitted from the assessment and a hearing upon notice and a deliberate judgment.

"The underlying question in the case is the proper construction of the statute N.J.S.A. 54:3-20 and a determination as to whether there is a difference in the phraseology 'property omitted by the assessor' and 'property omitted in the assessment'. Both phrases have occurred in our statutes since P.L. 1848, p. 230 was enacted. The first statute had two paragraphs. They were combined in substantially the present form in the Revision of 1903. If property in a taxing district is omitted by the assessor it must be added to the assessment before April 1st. Its addition decreases the amount of taxes to be raised since the ratables are thereby increased. The taxpayer is not embarrassed. He knows he will have a tax to pay and is liable anyway even if the property was not included in the assessment. However, if property is added to the assessment after the rate

> has been fixed it gives rise to a municipal windfall. There is no harm in this if there were due notice and a fair hearing by the county board and a judicial determination by it. The procedure adopted in this case was not in accordance with the statute. Property omitted by the assessor must be added before April 1st, so that the rate of taxation may be determined. Thereafter, the addition of property omitted from the assessment must be in accordance with the part of the statute first quoted. *Mitsch* v. *Riverside*, 86 N.J.L. 603, 92 A. 436; *Shillingsburg* v. *Greenwich*, 83 N.J.L. 129, 83 A. 644."

The words "omitted by the assessor" appearing in the first sentence of R.S.N.J. 54:3-20 thus have, as was held by Mr. Justice Bodine in the *Duke Power Company* case, a legislative meaning distinct from the words "omitted in the assessment" appearing in the third sentence of that section.

Under New Jersey Law there is no "assessment" until the work of the County Board of Taxation is finished and the corrected, revised and completed duplicates are delivered on or before April 1 by that Board to the collectors of the various taxing districts in the county. *Hohenstatt* v. *Bridgeton*, 62 N.J.L. 169, 40 Atl. 649 (Sup. Ct. 1898); *Town of Union* v. *Hudson County Board of Taxation*, 77 N.J.L. 178, 71 Atl. 46 (Sup. Ct. 1908); *Merchants etc. Fire Insurance Company* v. *Essex County Board of Taxation*, 16 N.J. Misc. 505, 192 Atl. 450 (Sup. Ct. 1937); and *Township of Middletown* v. *Ivins*, 102 N. J. L. 36, 130 Atl. 648 (Sup. Ct. 1925). In the *Ivins* case, *supra*, the Supreme Court said (102 N. J. L., p. 42, 130 Atl., p. 651) that:

> "the valuation or assessment made originally by the assessor, and returned to the county board of taxa-

tion, was not a completed assessment, and did not become such until acted upon by the county board, which does not render a judgment, but acts upon its own information and knowledge, and, after investigation, makes the changes necessary in order to perform its duty of seeing that property is taxed equally and at its true value."

Petitioners' argument, that the so-called remedial statutes R.S.N.J. 54:4-58 and 54:4-59 should have been held applicable to cure the illegality of the actions of the Somerset County Board of Taxation, is met by the following explicit passage in Mr. Justice Bodine's opinion in the *Duke Power Company* case (129 N. J. L., p. 457, 30 A. (2d), p. 420) as follows:

> "Since none of the property in question was liable to taxation in Hillsborough Township, we need not consider the application of the remedial statutes N.J.S.A. 54:4-58 to 54:4-60. However, the remedial statutes we do not find to have been a substitute for proper assessment. Their application has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner. *Musconetcong Iron Works* v. *Borough of Netcong*, 90 N. J.L. 58, 99 A. 914; *Manistee Iron Works* v. *Raritan*, 12 N.J. Misc. 143, 170 A. 39. But they do not apply where the statute for the addition of property omitted from the assessment is not complied with. *Mitsch* v. *Riverside*, 86 N.J.L. 603, 92 A. 436; *Shillingsburg* v. *Greenwich*, 83 N.J.L. 129, 83 A. 644."

Petitioners contend that this is mere dictum. But it is apparent that this characterization is completely erroneous. The conclusion that the remedial statutes were

inapplicable was absolutely essential to the holding that the assessment was null and void. And that holding was one of the two separate and coordinate grounds of the Court's determination of the case. As above stated, the Supreme Court and the Court of Errors and Appeals held both that the assessments were a nullity and that the property assessed was exempt. Either holding would have been sufficient to dispose of the case. But the decision was rested equally on both grounds. It is thus impossible to say that either ground was decision and the other dictum. That was expressly held by this Court in *United States* v. *Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924), as follows:

> "But it is urged that what we have described as ruled there was *obiter dictum* and should be disregarded, because the Court there gave a second ground for its decision which was broad enough to sustain it independently of the first ground. The premise of the contention is right but the conclusion is wrong; for where there are two grounds upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other." *Union Pacific R.R. Co.* v. *Mason City & Fort Dodge R.R. Co.*, 199 U. S. 160, 166; *Railroad Companies* v. *Schutte*, 103 U.S. 118, 143."

This Court's language that each ground of decision "is the judgment of the Court and of equal validity with the other" makes irrelevant petitioners' attempt (Br. pp. 38-39) to distinguish between obiter dictum and judicial dictum. For it makes plain that, in a case like this, the conclusion is a decision, and not dictum at all, either obiter or judicial. In the *Duke Power Company* case the concluding paragraph of Mr. Justice Bodine's opinion was:

> "Since the property assessed was not subject to taxation *and* since the procedure before the State Board was no substitute for a proper proceeding before the County Board the assessment is set aside and the judgment is reversed." (italics ours.)

The judgment of reversal was therefore based squarely on both of the two independent grounds: (1) the invalidity of the assessment under Section 54:3-20; and (2) the exemption of the property assessed. And to the holding on the first ground the decision of the inapplicability of the remedial statutes was an essential prerequisite.

As Goodrich, C.J., said in the Court below (149 F. (2d), p. 621; R. 155):

> "We see not the slightest reason for supposing that the court did not mean just what it said when it rested its decision on both points."

Petitioners argue at p. 34 of their brief that, accepting the view that the remedial statutes do not apply to property "omitted in the assessment", they should be applied to the assessments against respondent as Trustee of Duke Endowment since no assessment had ever previously been made against the Endowment and thus its property was property "omitted by the assessor".

This argument completely misconceives the true distinction between omission "by the assessor" and omission "in the assessment". As we have shown, property is "omitted by the assessor" within the meaning of the first sentence of R.S. 54:3-20 when overlooked by the taxing district in preparing its tax lists; but property is "omitted in the assessment" when it has not been listed by the assessor or added before April 1 by the County Board during the revision

period after receipt of the tax lists from the taxing districts. Once that date has passed without inclusion of an assessment against particular property, that property is "omitted in the assessment". Moreover, so far as concerns petitioners' argument on the assessment against respondent as Trustee of the Duke Endowment, the addition of a new taxpayer, without prior notice to him and without hearing, is more drastic and oppressive action than is adding to the assessed property of a taxpayer already on the rolls, and hence more within the reason of the statutory requirements embraced in the third sentence of Section 54:3-20.

Petitioners also argue (Br. p. 32) that respondent was given notice that the next regular meeting of the Somerset County Board of Taxation would be held on July 14, 1941 and that she did not attend the meeting, and neither requested nor was refused a hearing. But this notice was one made after the resolution of the County Board had already purported to add the property to the assessment duplicate and was admittedly pursuant to the procedure provided in the first two sentences of Section 54:3-20, which in contrast to the third sentence did not even purport to require a hearing, and which the *Duke Power Company* case held inapplicable. That a substantially identical notice was given to the Duke Power Company after this same County Board's identical action of November 22, 1940, appears from the following paragraphs of Mr. Justice Bodine's opinion (129 N.J.L., p. 452, 30 A. (2d), p. 418):

> "The prosecutor later received the following notice: 'Please take notice that the next meeting of Somerset County Board of Taxation will be held at the Court House in Somerville, New Jersey, at 10 A.M. on Monday, December 2d, 1940.'

> "In compliance therewith its counsel attended at the time specified and was told by the president of the Board: 'We didn't ask you to be here. We simply notified you that we would have our regular meeting to-day and the reason for that was that if you desired to examine the records of the Board of that meeting [of November 22d, 1940] it was your privilege to do it.'"

Mr. Pitney's affidavit in the instant case (R. 101) includes in its description of the proceedings before the County Board, recited by Mr. Justice Bodine in the above-quoted extract, the fact that the President of the Board also said:

> "We feel that the case is closed as far as we are concerned."

The affidavit shows (R. 100) that Mr. Pitney was present at that meeting, and so is a competent witness to what occurred therein. As petitioners phrase it in their brief (p. 32), "At the next meeting of the Tax Board the attorneys for the Duke Power Company appeared before the Board and were refused a hearing."

Plainly, if respondent in this case had attended the "next regular meeting of said Board" on July 14, 1941, she would have been similarly refused a hearing. But there was no obligation on respondent to attend before the County Board at all, since it was proceeding without authority of law and could take no action which would not be a sheer futility. As Mr. Justice Bodine said in the *Duke Power Company* case (129 N.J.L., pp. 454-455, 30 A. (2d), p. 419):

> "The County Board could not, on its own motion, make the assessment on November 22d, 1940, and then act as an appellate body on December 2d,

1940. It was not acting according to law at either time. It might just as well have taken the figures for the assessment out of a news report."

It is well settled that county boards of taxation are special statutory tribunals and may not act without express statutory authority or outside the time limits prescribed by the statutes defining their powers. *Acquackanonk Water Co.* v. *Passaic Board of Taxation*, 88 N.J.L. 555, 96 Atl. 481 (Sup. Ct. 1916); *N. J. Zinc Co.* v. *Sussex County Board of Equalization*, 70 N.J.L. 186, 56 Atl. 138 (Sup. Ct. 1903).

It is clear that the *Duke Power Company* case was the decision of the highest court of New Jersey on the very questions of New Jersey law on which the courts below decided this case, and on facts indistinguishable from those of this case. The action of the courts below in granting and affirming judgment herein in accordance with that decision was therefore manifestly correct.

CONCLUSION

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT SHOULD BE IN ALL RESPECTS AFFIRMED.

Respectfully submitted,

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On the Brief

December 7, 1945.

APPENDIX

Full text of all sections of the Revised Statutes of New Jersey cited in the foregoing brief.

TITLE 54. TAXATION.

SUBTITLE 1. DEPARTMENT AND BOARDS FOR THE REVIEW, ASSESSMENT AND COLLECTION OF TAXES.

Chapter 3. *County Boards of Taxation*

54:3-11. *County boards of taxation replace predecessors.* The county boards of taxation shall have all the powers formerly exercised by commissioners of appeal and local boards charged with the duty of reviewing taxes on appeal, under such rules as they may from time to time adopt, and shall perform all the duties formerly performed by county boards of equalization or other county boards charged with the review or equalization of tax assessments or tax lists, and all the duties formerly performed by the county boards of assessors.

54:3-20. *Assessment of omitted property.* The county board of taxation shall, by resolution, cause to be entered upon the tax duplicate a proper assessment against any property omitted by the assessor. The board shall then give immediate notice of such entry and of the time and place of its next meeting to the owner of the property affected, and furnish a copy of the entry to the clerk or collector of the taxing district, who shall enter it on his tax list. On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining, and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing, a transcript whereof shall be furnished by the board to the col-

lector, who shall amend his duplicate accordingly. The collector shall present such complaints and serve such notices as the governing body may direct and shall attend before the board and subpoena proper witnesses and pay their fees. He shall receive reimbursement therefor and two dollars for every day he shall attend for his services from the taxing district. Such proceedings may be brought within one year from the date when taxes on real property become a lien.

54:3-21. *Appeals by taxpayers; by taxing district; petition.* A taxpayer feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the county, or a taxing district which may feel discriminated against by the assessed valuation of property in the taxing district, or by the assessed valuation of property in another taxing district in the county, may on or before August fifteenth appeal to the county board of taxation by filing with it a petition of appeal. A copy thereof shall also be filed with the clerk or attorney of the taxing district, setting forth the cause of complaint, the nature and location of the assessed property and the relief sought. The petition shall be signed and sworn to by the petitioner or his agent, and shall be in such form and contain such further information as may be from time to time prescribed by rule of the board, for the better understanding and determination of the appeal.

54:3-22. *Hearing of appeals; witnesses.* The board shall thereupon make such order respecting the time and manner for hearing the appeal as it may deem just, and shall summarily hear and determine the appeal, and revise and correct the assessment in accordance with the true value of the taxable property. It may compel the attendance of witnesses, the production of books and papers before it, examine witnesses or cause witnesses to be examined under

oath before it, which oath may be administered by a member of the board.

Subtitle 2. Taxation of Real and Personal Property in General.

Chapter 4. *Assessment and collection of taxes*

54:4-1. *Property subject to tax; date of assessment.* All property, real and personal, within the jurisdiction of this state not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon.

54:4-3.2. *Exemption of personal property outside state.* The personal property owned by citizens or corporations of this state, situate and being out of the state, upon which taxes shall have been actually assessed and paid within twelve months next before October first, being the day prescribed by law for commencing the assessment shall be exempt from taxation under this chapter.

54:4-12. *Assessor; duties; ascertain persons and property taxable.* The assessor shall annually ascertain by diligent inquiry and by the oath of persons to be assessed and others, according to the best of his ability and judgment, the names of all persons taxable in his district and the true value of all the personal property therein. Every inhabitant of the taxing district, and every owner of personal property located in the district, shall, on application of the assessor, forthwith render a true account of his name and

personal property, money, effects and credits, and the assessor shall set down in a list in proper columns the names, the value of the personal estate assessed to each one, including the amount of the collectible debts due to him except debts secured by mortgage on real estate in this state, the amount allowed by the assessor as a deduction from such value for debts due and owing by the taxpayer, and for exemptions, and the net value of personal property assessed to each person. The assessor shall also ascertain and enter in the list in the appropriate column opposite each name, any poll tax and any dog tax chargeable against such person.

54:4-23. *Duty of assessor; standard of value.* The assessor shall ascertain the names of the owners of all real property situate in his taxing district, and, after examination and inquiry, determine the full and fair value of each parcel of real property situate in the taxing district at such price as, in his judgment, it would sell for at a fair and bona fide sale by private contract on October first next preceding the date on which the assessor shall complete his assessments, as hereinafter required.

54:4-24. *Assessor's list; form and content.* The assessor shall make a list in tabular form of the names of the owners, and set down in proper columns opposite each name the description and area of each parcel sufficient to ascertain its location and extent and the value of each parcel as determined by him. Property held in trust shall be assessed in the name of one or more of the trustees as such, separately from his individual assessment. If the name of the owner of a parcel shall be unknown, it shall be so entered in the list of names, and where an owner is not known to reside in the taxing district the list shall describe him as nonresident.

54:4-35. *Period for assessing; assessor's duplicate.* The assessor shall begin the work of making assessments upon real and personal property on October first in each

year and shall complete the work by January tenth following, on which date he shall attend before the county board of taxation and file with the board his complete assessment list, and a true copy thereof, to be called the assessor's duplicate, properly made up and legibly written in ink, to be examined, revised and corrected by the board as hereinafter provided.

54:4-46. *Tax lists and duplicates revised by county board.* Upon the filing of the assessment lists and duplicates by the assessors with the county board of taxation, the board shall meet for the purpose of examining, revising and correcting the tax lists and duplicates. Any assessor shall attend before the board at such time and place as it may direct, and shall, under the direction and supervision of the board, make up and prepare corrected tax lists and duplicates.

54:4-47. *Revision and equalization; functions of county board.* The county board may adjourn from time to time in the discharge of its duties, and may, after investigation, revise, correct and equalize the assessed value of all property in the respective taxing districts, increase or decrease the assessed value of any property not truly valued, add to the lists and duplicates any property which has been omitted or overlooked, at its true value, and in general do everything necessary for the taxation of all property in the county equally and at its true value.

54:4-55. *Corrected duplicates returned to taxing districts; lists remain of record.* The county board of taxation shall, on or before April first in each year, cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes assessed, to be delivered to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record.

54:4-58. *Tax, assessment or water rate not set aside for irregularities or illegality.* No tax, assessment or water

rate imposed or levied in this state shall be set aside or reversed in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying or levying any such tax, assessment or water rate, or in the proceeding for its collection if the person against whom or the property upon which it is assessed or laid is, in fact, liable to taxation, assessment or imposition of the water rate, in respect to the purposes for which the tax, assessment or rate is levied, assessed or laid.

54:4-59. *Court to amend and fix amount due.* The court in which any action, suit or proceeding is or shall be pending to review any such tax, assessment or water rate shall amend all irregularities, errors or defects, and may if necessary ascertain and determine the sum for which the person or property was legally liable and by order or decree fix the amount thereof. The sum so fixed shall be the amount of tax, assessment or water rate for which the person or property shall be liable.

Subtitle 4. Particular Taxes on Corporations and Others.

Part 4. Taxation of Railroad and Canal Companies.

Chapter 24. *Assessment, levy and disposition*

54:24-3. *"Average rate of taxation": computation; statements by local assessors.* The "average rate of taxation" shall be computed in the following manner: On or before April first in each year the assessor in every taxing district shall prepare and forward to the state tax commissioner a certificate, under his hand and seal, duly sworn to under oath, certifying to the commissioner the true value of all property, real and personal, located in his taxing district, other than the property of railroad and canal companies the taxation of which is provided for by this article, but including therein the assessed value of property of rail-

road and canal companies particularly described in subdivision II of section 54:22-1 of this title, and shall also certify and report the rate of taxation in the taxing district for that year. The aggregate value of all the property, real and personal, so certified, shall be deemed to be the aggregate value of the general property in the state. In each taxing district the amount obtained by multiplying the value of all the property in the taxing district by the rate of taxation therein shall be deemed to be the total taxes of the taxing district, and the aggregate of the total taxes so ascertained shall be deemed to be the aggregate taxes of the state. The "average rate of taxation" shall be computed and determined by the commissioner by dividing the aggregate taxes by the aggregate value of the general property in the state. The rate so arrived at and determined shall be entered upon the records of the state tax department and shall constitute the "average rate of taxation" for that year.

SUPREME COURT OF THE UNITED STATES.

No. 305.—October Term, 1945.

Township of Hillsborough, Somerset County, N. J., and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, Petitioners, *vs.* Doris Duke Cromwell, Individually and as Trustee of the Duke Endowment.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 28, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

This action was brought by respondent under the Declaratory Judgment Act, Judicial Code, § 274(d), 28 U. S. C. § 400, to have declared null and void certain assessments on intangible personal property entered for the years 1940 and 1941 by the Collector of Hillsborough Township, Somerset County, New Jersey.[1] The jurisdiction of the federal court in New Jersey was invoked by reason of diversity of citizenship and the allegation that the taxing authorities had consistently, systematically and intentionally singled out respondent for discriminatory treatment in the assessment of taxes for which she was without remedy under the laws and decisions of New Jersey. It was prayed that the assessments be declared invalid as in contravention of the due process and equal protection clauses of the Fourteenth Amendment and of the provisions of applicable New Jersey statutes to which we will later refer. The District Court denied a motion to dismiss and gave judgment for respondent. 56 F. Supp. 41. The Circuit Court of Appeals affirmed. 149 F. 2d 617. The case is here on a petition for a writ of certiorari which we granted because the asserted

[1] The assessments call for tax payments of nearly $7,000,000 for each year as compared with the Township's budget of something like $97,000 annually. Prior to these assessments the net assessed valuation for taxation of all property assessed, both real and personal, in the township amounted to $3,117,863 for 1940 and $3,139,020 for 1941. The resulting tax rate was 3.12 per cent for 1940 and 3.10 per cent for 1941. The additional assessments against respondent apparently would have increased the valuation of the township tax ratables by $221,940,438 for each of the two tax years, though it would not have affected the tax rates for those years.

conflict of that decision with *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, raised an important problem concerning the relationship between the federal courts and state taxing authorities.

Sec. 267 of the Judicial Code, 28 U. S. C. § 384, provides that suits in equity shall not be sustained in the federal courts "in any case where a plain, adequate, and complete remedy may be had at law." That principle has long been recognized as having "peculiar force" in cases where the federal courts were asked to enjoin the collection of a state tax. *Matthews v. Rodgers*, 284 U. S. 521, 525, and cases cited. "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Id.*, p. 525. Where the remedy at law is "plain, adequate, and complete", it is the one which must be pursued even for the protection of any federal right. That practice of the federal equity courts was given further recognition and sanction by Congress in the Johnson Act, 48 Stat. 775, as amended, 50 Stat. 738, § 24(1) of the Judicial Code, 28 U. S. C. § 41(1), which provides that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." It was against that background that we held in *Great Lakes Dredge & Dock Co. v. Huffman, supra*, that the policy which led federal courts of equity to refrain from enjoining the collection of allegedly unlawful state taxes should likewise govern the exercise of their discretion in withholding relief under the Declaratory Judgments Act.

The Circuit Court of Appeals fully recognized the principle of the *Huffman* case, but concluded that the state procedure was not "speedy, efficient or adequate" to protect the federal right against discriminatory state taxation. It is around that conclusion that the first phase of this controversy turns.

The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed

on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 445-447; *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U. S. 239, 247; *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 28-29. The courts of New Jersey in a long line of decisions[2] have held that a taxpayer who has been singled out for discriminatory taxation may not obtain equalization by reduction of his own assessment. His remedy is restricted to proceedings against other members of his class for the purpose of having their taxes increased. The rule was stated in *Royal Mfg. Co.* v. *Board of Equalization*, 76 N. J. L. 402, aff'd 78 N. J. L. 337, as follows: "... the county boards are required to secure taxation of all property at its true value; so that the fact that the property of A is assessed at its true value and the property of other taxpayers within the same district is assessed below its true value, affords A no ground for demanding a reduction of his valuation, though it does entitle him to apply for an increase in the valuation of the others." 76 N. J. L. pp. 404-405. On the basis of that rule it is plain that the state remedy is not adequate to protect respondent's rights under the federal Constitution.

It is argued, however, that in 1933 the New Jersey courts adopted a different rule when *Central R. Co.* v. *Thayer-Martin*, 112 N. J. L. 5, was decided by the Court of Errors and Appeals. In that case the court did entertain an objection that the particular tax assessment violated the rule of *Sioux City Bridge Co.* v. *Dakota County*, *supra*. It found that the complaining taxpayer had not shown that a discrimination within the meaning of our cases existed. So it is argued that as the highest court in New Jersey recognized the federal rule, the federal District Court should have remitted respondent to her remedy in the New Jersey courts. There is, however, a two-fold difficulty with that position.

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[2] State v. Randolph, 25 N. J. L. 427, 431; State v. Taylor, 35 N. J. L. 184, 189; State v. Koster, 38 N. J. L. 308; State v. Segoine, 53 N. J. L. 339, 340, aff'd 54 N. J. L. 212; Central R. Co. v. State Board, 74 N. J. L. 1; Royal Mfg. Co. v. Board of Equalization, 76 N. J. L 402, 78 N. J. L. 337; Pennsylvania Coal Co. v. Saddle River, 96 N. J. L. 40, 43.

In the first place, the same judge who wrote the opinion for the Court of Errors and Appeals in the *Thayer-Martin* case wrote the opinion for the Supreme Court of New Jersey a year later in *Lehigh Valley R. Co.* v. *State Board*, 12 N. J. Misc. 673. The taxpayer contended that the state board of tax appeals erred in refusing to admit evidence of discrimination. The argument was that the rule of *Sioux City Bridge Co.* v. *Dakota County*, *supra*, should be followed and the holding of *Royal Mfg. Co.* v. *Board of Equalization*, *supra*, should be disapproved. The Supreme Court of New Jersey declined to allow a writ of certiorari to review the judgments of the state board of tax appeals. It did not mention the *Thayer-Martin* case, but followed *Royal Mfg. Co.* v. *Board of Equalization*, *supra*, saying that the New Jersey law on the point was "settled and controlling." 12 N. J. Misc. p. 675. If, therefore, may well be true, as respondent says, that the court in the *Thayer-Martin* case simply decided that the point raised by the taxpayer was not supported by facts and found it unnecessary to consider whether, if systematic discrimination had been shown, New Jersey would have afforded an adequate remedy. In any event, there is such uncertainty concerning the New Jersey remedy as to make it speculative (*Wallace* v. *Hines*, 253 U. S. 66, 68) whether the State affords full protection to the federal rights. In the second place, the state board of tax appeals to which respondent might have appealed concededly has no right to pass on constitutional questions.[3] Its judgments may be reviewed by the New Jersey Supreme Court by certiorari. The allowance of that writ, however, is not a matter of right, but purely discretionary.[4] And the refusal of a writ of certiorari by the Supreme Court may not be judicially reviewed by the Court of Errors and Appeals.[5] Accordingly we conclude that there was such uncertainty surrounding the adequacy of the state remedy as to justify the District Court in retaining jurisdiction of the cause. While the charges of discrimination in the complaint were denied, the jurisdiction of the District Court is determined by the allegations of the bill (*Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271) which here were substantial.

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[3] Duke Power Co. v. Hillsborough Township, 20 N. J. Misc. 240, 243 (reversed on another point 129 N. J. L. 449); Schwartz v. Essex County Board, 129 N. J. L. 129, 132, aff'd 130 N. J. L. 177.

[4] Staubach v. Cities Service Oil Co., 130 N. J. L. 157.

[5] Post v. Anderson, 111 N. J. L. 303; Staubach v. Cities Service Oil Co., *supra*, note 4.

This brings us to the second phase of the controversy. Neither the District Court nor the Circuit Court of Appeals decided the case on federal grounds. They held in reliance on *Duke Power Co. v. State Board*, 129 N. J. L. 449, 131 N. J. L. 275, that the assessments were invalid under the New Jersey statutes. In that case, as in the present one, property "omitted in the assessment" was attempted to be assessed by the County Board against the taxpayer after April 1st of each of the tax years involved without notice and hearing.[6] The assessment was set aside as not being in conformity with the statute. And it was held that the remedial statutes,[7] designed to cure irregularities in assessing or levying taxes, "do not apply where the statute for the addition of property omitted from the assessment is not complied with." 129 N. J. L. p. 457.

Petitioner argues that it is clear from *Duke Power Co. v. State Board, supra*, that respondent had a remedy in the state tribunals for failure of petitioner to follow the procedure required by the New Jersey statutes and that the federal court should have required her to pursue it. We have held that where a federal constitutional question turns on the interpretation of local law and the local law is in doubt, the proper procedure is for the federal court to hold the case until a definite determination of the local

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[6] N. J. Rev. Stat. § 54:3-20 provides in part, "On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining, and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing, a transcript whereof shall be furnished by the board to the collector, who shall amend his duplicate accordingly."

A different procedure is provided by § 54:3-20 for inclusion of property "omitted by the assessor." For a discussion of the difference between the two types of assessments see Duke Power Co. v. State Board, *supra*, 129 N. J. L. pp. 452-455. At p. 455, the court said:

"If property in a taxing district is omitted by the assessor it must be added to the assessment before April 1st. Its addition decreases the amount of taxes to be raised since the ratables are thereby increased. The taxpayer is not embarrassed. He knows he will have a tax to pay and is liable anyway even if the property was not included in the assessment. However, if property is added to the assessment after the rate has been fixed it gives rise to a municipal windfall. There is no harm in this if there were due notice and a fair hearing by the County Board and a judicial determination by it."

[7] Sec. 54:4-58 provides:

"No tax, assessment or water rate imposed or levied in this state shall be set aside or reversed in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying or levying any such tax, assessment or water rate, or in the proceeding for its collection

law can be made by the state courts. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101. The latter case involved a suit in which the constitutionality of a Connecticut tax was challenged. There was uncertainty concerning the meaning of the local law. Under one construction the constitutional issues would fall; and in any event a decision by the state courts would cause the constitutional issues to be formulated in an authoritative rather than a speculative way. But it was clear that there was available a state remedy to which the complainant could resort on the remand of the cause. In the present case it appears that respondent's opportunity to appeal to the State Board of Tax Appeals[8] had expired even before the District Court ruled on the motion to dismiss.[9] And it is not clear that today respondent has open any adequate remedy in the New Jersey courts for challenging the assessments on local law grounds.[10] Moreover, *Duke Power Co.* v. *State Board*, *supra*, decided shortly before the District Court rendered judgment,[11] gave an authori-

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if the person against whom or the property upon which it is assessed or laid is, in fact, liable to taxation, assessment or imposition of the water rate, in respect to the purposes for which the tax, assessment or rate is levied, assessed or laid."

Sec. 54:4-59 provides:

"The court in which any action, suit or proceeding is or shall be pending to review any such tax, assessment or water rate shall amend all irregularities, errors or defects, and may if necessary ascertain and determine the sum for which the person or property was legally liable and by order or decree fix the amount thereof. The sum so fixed shall be the amount of tax, assessment or water rate for which the person or property shall be liable."

The court in Duke Power Co. *v.* State Board, *supra*, 129 N. J. L. p. 457, stated that "the remedial statutes we do not find to have been a substitute for proper assessment. Their application has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner."

[8] Ninety days are allowed. State Board of Tax Appeals, Rule V(c), CCH. Corp. Tax Serv. par. 89-505. The resolutions of the County Board attempting to make the assessments were entered June 26, 1941.

[9] The present bill was filed in July, 1941, the answer in September, 1941, and the motion to dismiss in November, 1941. The order denying the motion to dismiss was made in August, 1942.

[10] It seems that under certain circumstances certiorari to the Supreme Court may be had in lieu of an appeal to the State Board of Tax Appeals. It was held in Schwartz *v.* Essex County Board, *supra*, note 3, that lack of jurisdiction of the county board or irregularity in its proceedings may be tested by certiorari. 130 N. J. L. p. 178. And see State *v.* Clothier, 30 N. J. L. 351. But as we have seen, note 4, *supra*, it is a discretionary writ.

[11] That case was decided by the Court of Errors and Appeals on March 9, 1944. The present case was decided by the District Court on July 14, 1944.

tative interpretation of the local law. Hence, the reason for holding the case in *Spector Motor Co.* v. *McLaughlin*, *supra*, and remitting the complainant to the state courts for determination of the local law question no longer was existent here.

It follows *a fortiori* that the bill should not have been dismissed. As stated in *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 520, "A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity." Though the availability of a state remedy on the local law question be assumed to exist, so much uncertainty surrounds the New Jersey remedy to protect the taxpayer's federal right that a refusal to dismiss the bill was a proper exercise of discretion. Thus however the case may be viewed, the exceptional circumstances which we have noted take it out of the general rule of *Great Lakes Dredge & Dock Co.* v. *Huffman*, *supra*. The District Court, therefore, properly proceeded to decide the case on the merits. That it placed its decision on local law grounds is not objectionable. For it is well-settled that where the federal court has jurisdiction, it may pass on the whole case and, agreeably with the desired practice decide it on local law questions, without reaching the constitutional issues. *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 191, 193; *Greene* v. *Louisville & I. R. Co.*, *supra*, p. 508; *Chicago Great W. R. Co.* v. *Kendall*, 266 U. S. 94, 97-98; *Risty* v. *Chicago R. I. & P. Ry. Co.*, 270 U. S. 378, 387; *Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116; *Hurn* v. *Oursler*, 289 U. S. 238, 243-248.

Petitioner makes an extended argument to the effect that *Duke Power Co.* v. *State Board*, *supra*, is not a controlling precedent on the local law question on which the decision below turned. On such questions we pay great deference to the views of the judges of those courts "who are familiar with the intricacies and trends of local law and practice." *Huddleston* v. *Dwyer*, 322 U. S. 232, 237. We are unable to say that the District Court and the Circuit Court of Appeals erred in applying to this case the rule of *Duke Power Co.* v. *State Board*, which involved closely analogous facts.

Affirmed.

Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or decision of this case.